TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 613

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GEORGE S. BUSH & CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

PETITION FOR CERTIORARI FILED DECEMBER 29, 1939
CERTIORARI GRANTED FEBRUARY 5, 1940

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 613

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GEORGE S. BUSH & CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

INDEX

Proceedings in United States Court of Customs and Patent Appeals	Original	Print
Petition for review	1	1
Assignment of errors	1	1
Record from United States Customs Court	1	1
Return	3	2
Appeal to reappraisement No. 113,195-A	3	2
Statement of evidence	4	3
Caption and appearances	5	4
Colloquy between Court and counsel	5	4
Exhibit No. 1—Report on canned clams, by Tariff Commission	5	4
Decision, Sullivan, J.	13	9
Judgment	51	39
Application for review	60	46
Clerk's certificate [omitted in printing]	61	47
Decision, Dallinger, J., on application for review	62	47
Judgment on review	63	48
Caption	76	58
Minute entry of hearing	77	61
Opinion, Hatfield, J.	77	61
Dissenting opinion, Lenroot, J.	77	61
Dissenting opinion, Jackson, J.	86	70
Judgment	91	75
Docket entry—Petition for rehearing filed	93	77
Order denying petition for rehearing	93	77
Docket entries—Motion for stay of mandate, etc.	93	77
Clerk's certificate	93	77
Order allowing certiorari	94	78
	95	79

209453—40——1

1 In United States Court of Customs and Patent Appeals

Customs Appeal Docket No. 4173

GEO. S. BUSH & CO., INC., APPELLANT

vs.

THE UNITED STATES, APPELLEE

Petition for review

Filed May 4, 1938

To the Honorable the United States Court of Customs and Patent Appeals:

Your petitioner, being dissatisfied with the decision and judgment of the United States Customs Court specified below, prays the court to review the questions involved therein, and for such relief as to the court shall seem just.

Decision of March 9, 1938, reappraisement circular 4253, on Seattle reappraisement 113195A/2553, relating to canned clams.

Assignment of errors

As grounds of error in said decision it is asserted that the court below erred:

1. In failing to reappraise said merchandise at the export value as defined in Section 402 (c), tariff act of 1930.
2. In failing to modify or reverse the decision and judgment of the trial court.

2 3. In finding that the proper dutiable value of the involved merchandise was the appraised value.

4. In failing to hold that the Presidential proclamation of May 1, 1934, T. D. 47031, is null and void so far as it relates to the clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in airtight containers.

5. In failing to review the report and findings of the U. S. Tariff Commission on canned clams (report 84) for the purpose of determining whether or not the Commission and the President acted in conformity with the provisions of Section 336, Tariff Act of 1930.

6. In holding that the method of converting foreign currency into U. S. dollars for the purpose of determining the differences in cost of production as referred to in Section 336 is a matter left to the discretion of the Tariff Commission.

7. In failing to hold that the Tariff Commission did not make a legal investigation of the differences in cost of production between the domestic canned clams and foreign canned clams other than razor clams.

San Francisco, April 30, 1938.

GEO. S. BUSH & CO., INC.,
Petitioner.

By LAWRENCE & TUTTLE,
G. R. T.,
Attorneys for Petitioner,
500 Sansome Street, San Francisco.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Charles F. Lawrence, being duly sworn, deposes and says that he is over the age of 18 years, and that on this day he served the within document upon the Assistant Attorney General, 201 Varick street, New York City, and upon the collector of customs at the port of Seattle, by depositing in a letter box of the U. S.
3 postal service a true copy thereof, in a sealed envelope addressed to each of said officials respectively, and with postage thereon fully prepaid.

CHARLES F. LAWRENCE.

Sworn to before me this 30th day of April, 1938.

S. F. STANLEY.

Designated to Administer Oath under Sec. 486. Tariff Act of 1930.

[File endorsement omitted.]

In United States Customs Court

No. 4173

[Title omitted.]

Return to Court of Customs and Patent Appeals

The petitioner above named, having applied to the United States Court of Customs and Patent Appeals for a review of the questions of law and fact involved in a decision of the United States Customs Court in the above case, and the said Court having ordered this Court to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the United States Customs Court does hereby transmit to said Court of Customs and Patent Appeals the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following: A copy of

1. Appeal to reappraisement 113195–A.
2. Proceedings before the Court.
3. Exhibit 1 referred to in the proceedings.
4. The decision of the trial court, Reap. Dec. 4034, and judgment.
5. Application for review.
6. Certificate of record.
7. The decision in question, Reap. Dec. 4253, and judgment.

The entry papers and Exs. 2 and 3, referred to in the testimony, will be forwarded later.

Witness the Honorable Presiding Judge of the United States Customs Court, this 25th day of May, A. D. 1938.

[SEAL] J. W. DALE, *Clerk.*

Reap. canned clams.

In United States Customs Court

Appeal to Reappraisement No. 113195–A

Filed April 27, 1936

Seattle, Wash. Filed Apr. 17, 1936. Dep. Col.

Consignee's Appeal to Reappraisement by a Justice of the United States Customs Court

(This appeal must be filed with the Collector of Customs within 10 calendar days from date of notice of appraisement.)

United States Customs Service

District No. 30, Port of Seattle

APRIL 17, 1936.

To the UNITED STATES CUSTOMS COURT,
New York, N. Y.

GENTLEMEN: Pursuant to the provisions of Section 501 of the Tariff Act of 1930, we hereby appeal from the appraisement by the United States Appraiser to a reappraisement by a Judge of the United States Customs Court, upon certain Canned

Claims entered with duress certificate imported by us in the S. S. Pres. Jefferson, entered April 6, 1936. Entry No. C. E. 4670. Collector's Appeal No. —.

Respectfully,

GEO. S. BUSH & CO., INC.,
Appellant,
JOHN P. HAUSMAN,
Pres., Seattle, Washington.

Hearing at Seattle, Wash.

Notify Lawrence & Tuttle, 500 Sansome St., San Francisco, Calif.

[File endorsement omitted.]

In United States Customs Court

Reappraisement 113195–A

GEO. S. BUSH & CO., INC. (Messrs. Geo. A. Jensen & Co.),
PLAINTIFF

vs.

THE UNITED STATES, DEFENDANT

Statement of evidence

SEATTLE, WASHINGTON, *June 26, 1936.*

Before Judge SULLIVAN

Appearances

Lawrence & Tuttle, Esquires, Attorneys for the Plaintiff, by George R. Tuttle, Esquire, of counsel. Joseph R. Jackson, Esquire, Assistant Attorney General, for the Defendant, by Joseph F. Donohue, Esquire, Special Attorney, of counsel.

Colloquy

MR. TUTTLE. This appeal, which is under the Act of 1930, relates to merchandise invoiced—There is 150 cases of 5
6 ounce canned white claims "Geisha Brand" and 150 cases of 8 ounce, presumably the same merchandise. It does not state on the invoice.

It was entered and appraised as stated on the invoice at American selling price. The Plaintiff contends that the proper dutiable value is the export value.

The merchandise of this nature is subject to a—We are not conceding the fact—I am stating it was assessed in accordance with the proclamation of the President, directing that canned clams of certain types be put on the American selling price for dutiable purposes.

The appeal and the point presented by plaintiff is that the Proclamation is void. We do not contest the price the appraiser used of $4.40 and $6.40 per case for similar merchandise on the date of exportation of this merchandise, at the same time we are contending that the—if the American selling price is not the correct dutiable basis, that the export value as shown by the invoice is $2.75 and $3.68 per case, less non-dutiable charges, or a net value of 2.5107 per case and 3.3598 per case is the correct dutiable value.

Judge SULLIVAN. Well, are you going to contend for an export value?

Mr. TUTTLE. Yes, Your Honor.

Judge SULLIVAN. You say it was ordered by Presidential Proclamation to be dutiable under the American selling price?

Mr. TUTTLE. It was.

Judge SULLIVAN. Can you give the T. D. of the Proclamation?

Mr. TUTTLE. I haven't the T. D., but I have a copy of the proclamation, which I intend to offer in evidence.

Judge SULLIVAN. If you have the T. D. number, we can find it very quickly.

Mr. TUTTLE. I should have, but I haven't.

EXAMINER. Here it is, T. D. 47031.

Judge SULLIVAN. That is the Presidential Proclamation?

Mr. TUTTLE. Yes. Does the Government agree or stipulate that the prices on the invoice I just mentioned is the export value of this merchandise, and that the foreign value is not higher?

7 Judge SULLIVAN. He says if the Court finds it has an export value that the price he has just named was the export value.

Mr. DONOHUE. The Government is ready to concede that the prices just stated by counsel are the export prices if the export value is found to be the proper dutiable value, but the prices were given by counsel without adding the dollar sign.

Judge SULLIVAN. That is a proper concession. If the Court finds export value governs, it is conceded the values you have enumerated, the values you named are correct.

Mr. DONOHUE. It is conceded by the Government.

Judge SULLIVAN. It is agreed by both parties there is no foreign value?

Mr. DONOHUE. Yes, Your Honor.

Judge SULLIVAN. Does the United States value supersede the American selling price, but the Proclamation bind—Off the record. (Colloquy here not reported.)

Mr. DONOHUE. Now Mr. Tuttle do you wish to complete the stipulation?

Mr. TUTTLE. Yes.

Mr. DONOHUE. Stipulate that the appraised values are the proper American selling prices and values if the Court finds the proper dutiable value to be the American selling price?

Mr. TUTTLE. That is agreeable.

Judge SULLIVAN. That is agreeable.

Mr. DONOHUE. We will also stipulate the merchandise covered by this controversy, which is the subject matter of T. D. 47031, the Presidential Proclamation.

Mr. TUTTLE. That is agreeable.

Judge SULLIVAN. If that is the case you won't need to offer the Proclamation, because the court can turn to that.

Mr. TUTTLE. I want to offer the report of the United States Tariff Commission, Report No. 84, relating to canned clams, which is addressed to the President of the United States, in a letter of transmittal dated April 25, 1934, and in the same booklet, the proclamations of the President on this report—The report of the Tariff Commission relates to three articles, "canned razor clams; other canned clams; and clam products." I
8 have struck out with pencil those parts of the report which bear on razor clams and other clam products, as neither of those commodities are involved in this present appeal, and I don't want the expense of a large record.

Judge SULLIVAN. Now you are offering that?

Mr. TUTTLE. I offer that in evidence.

Judge SULLIVAN. Any objection?

Mr. DONOHUE. Yes, Your Honor. I think it is sufficient to object at this point on the ground the materiality or relevancy of the exhibit has not been shown.

The Plaintiff has opened his case, and stated only that he is contesting the value returned under the Presidential Proclamation. Now here is a report made by the Tariff Commission to the President. Your Honor is aware this court cannot sit to review the action of the Tariff Commission.

If this document is offered as proof of the facts that it contains, then it is certainly objectionable as not being the best evidence.

Judge SULLIVAN. It is a public document, and the best evidence if it is proper to be admissable, I would not want to keep it out. That is a public document.

Mr. DONOHUE. It is a public document, and it has the same force and effect as any other public document, but it is not merely because it is a public document admissable, because of the facts it contains. I admit of course the existence of T. D. 47031. It is not necessary to offer the report. This is a report to the President by the Tariff Commission containing facts. Its purpose has not been shown, and it is not per se evidential for the facts which it contains.

Judge SULLIVAN. There is only one fact Mr. Donohue that might be admissable along the lines, on the part of the plaintiff, the fact as to whether or not there was a public hearing. We were reversed not so long ago, in an appeal taken by Mr. Bevans, in a case——

Mr. DONOHUE. I recall that.

Judge SULLIVAN. We cannot weigh any fact. They are conclusive as far as we are concerned, but if the question may be raised as to whether or not the proclamation was issued by virtue of public hearings, and that notice was given to those interested in that line of the nature of the commodity under investi-
9 gation, that might be essential to look at that for jurisdictional purposes, but not for the purpose of ascertaining whether or not the facts would justify the conclusion by the Commission. That we cannot enter into at all. But it might be for the purpose of ascertaining whether the President acted within the law when he issued the proclamation.

Mr. DONOHUE. I believe the case to which Your Honor refers is Zeiss vs. The United States. In that case Your Honor will recall testimony was first offered to show that proper notice of hearing was not given, and that dealers in the merchandise affected by the proclamation would not be reasonably informed a hearing was to be held, therefore the documents concerning the report were properly admitted in evidence by this Court. I submit in such event.

Judge SULLIVAN. In the Foster case, possibly not the Foster case, but in the Dutchess Hat case, which Division 1 passed on, I wrote the opinion myself, and I excluded all the reports of the Tariff Commission. While that judgment of the lower court was affirmed, Judge Bland, writing the opinion, held that it would have been proper for the Court to admit the report of the Tariff Commission, to ascertain whether the jurisdictional fact was had to give the President the power to act. For that reason I would not like to keep it out. But do not understand that I am going to pay much attention to any fact stated therein, nor any conclusion the President may have arrived at, as I am speaking now entirely from memory. All I think I can do, would be to ascer-

tain whether or not the President acted within the law in declaring the proclamation. As to the facts, that is foreclosed.

Mr. DONOHUE. If Your Honor will hear me, just once more, I recall as Your Honor does, that the Court held in that series of cases, involving the Presidential proclamation, that these documents were admissible when a jurisdictional fact was questioned. In the case at bar, there certainly has been no showing from which the court may infer he is raising a jurisdictional question, and until that question is raised this report is not admissible.

Judge SULLIVAN. Yes; but he said they were opposing the Presidential Proclamation, and claiming it was void.

Mr. DONOHUE. That may be, because he is challenging the constitutionality of the law, so until he shows just what he is challenging——

Judge SULLIVAN. He can do this in his brief so far as I know. Now he is challenging it on every ground, of course, constitutionally. I don't think he will get very far, but that Zeiss case, rather stinted me a little bit, and I will be a little more careful about keeping out these reports of the Tariff Commission. If that is your ground for objection, I would be inclined to let it in, but I will be guided by the decisions rendered in arriving at whether the President followed the law jurisdictionally.

Mr. DONOHUE. I wish to submit to Your Honor, no foundation has been laid to justify the admission of this document.

Judge SULLIVAN. You don't have to.

Mr. DONOHUE. May I have an exception?

Judge SULLIVAN. Overruled. Let it be marked.

Report referred to marked in evidence Exhibit 1, Reappraisement 113195–A, of this date.

Mr. TUTTLE. We rest.

Mr. DONOHUE. We rest.

Mr. TUTTLE. We submit.

Mr. DONOHUE. We submit.

Mr. TUTTLE. I ask for 60 days for brief, after transcription of the testimony.

Mr. DONOHUE. Sixty days thereafter for the Government to reply.

Mr. TUTTLE. Do you want to put in some samples?

Mr. DONOHUE. Yes.

Judge SULLIVAN. Withdraw the submission.

Mr. DONOHUE. The Government moves in evidence two samples, and I ask they be marked Exhibits 2 and 3, and I ask counsel for the Plaintiff to agree they are samples of the merchandise involved.

Mr. TUTTLE. No objection. We agree to that.

Judge SULLIVAN. All right; they are admitted and will be marked Exhibits 2 and 3.

11 Samples referred to marked in evidence Exhibits 2 and 3, Reappraisement 113195–A, of this date.

Judge SULLIVAN. Let the record show the Plaintiff has been given 60 days to file a brief, and the Government 60 days thereafter. Case submitted.

I do certify that the foregoing transcript is a correct and true transcription of all testimony offered, heard, or introduced by either party on the trial, together with all the objections made, rulings thereon, and exceptions thereto.

F. D. NESBITT.

13 *Exhibit No. 1*

15 United States Tariff Commission

CANNED CLAMS

Report to the President on the differences in costs of production of canned clams in the United States and in the principal competing country, as ascertained pursuant to the provisions of section 336 of title III of the Tariff Act of 1930. With appendix. Proclamation by the President. Report No. 84, second series.

16 United States Tariff Commission

Robert L. O'Brien, Chairman. Thomas Walker Page, Vice Chairman. Edgar B. Brossard, John Lee Coulter, Sidney Morgan. Secretary. Address all communications United States Tariff Commission, Washington, D. C.

17 CONTENTS

	Page
Letter of transmittal	19
Findings of the Commission:	
I. Razor clams	22
II. Other canned clams	23
Conclusion	26
Summary of information obtained in the investigation:	
Scope of the investigation	27
PART I. RAZOR CLAMS	
Description and uses	28
Domestic production	28
Exports	29
Imports and principal competing country	29
Comparability of domestic and imported clams	29
Cost of production	30
Markets and transportation costs	31

PART II. OTHER CLAMS

	Page.
Description and uses	32
Domestic production	32
Exports	34
Imports and principal competing country	34
Comparability of domestic and imported clams	34
Domestic costs of production	35
Foreign costs of production	36
Markets and transportation costs	37
Comparative costs	38
Rates of exchange	39

PART III. CLAM PRODUCTS

Production, imports, and exports	40
Appendixes:	
I. Statistical data	43
II. Proclamation by the President	49

19

Letter of Transmittal

UNITED STATES TARIFF COMMISSION,
Washington, April 25, 1934.

MY DEAR MR. PRESIDENT: I have the honor to transmit herewith the report of an investigation made by the United States Tariff Commission of differences in costs of production in the United States and in the principal competing countries, for the purposes of section 336 of title III of the Tariff Act of 1930, of

CANNED CLAMS

This report is accompanied by a summary of information obtained by the Commission in the investigation.

A copy of this report was, on April 5, 1934, submitted for consideration by the Executive Committee on Commercial Policy. Assistant Secretary of State Sayre, as chairman of that committee, states, in a letter dated April 19, 1934, that the committee is in accord with this report. Mr. Sayre suggests that the letter of transmittal to you include a statement interpreting in terms of ad valorem duty the change to American selling price as the basis for assessment of the 35-percent ad valorem. In accordance with that suggestion, I report that the approximate rates of duty on foreign value equivalent to 35 percent on American selling price, using prices and values ascertained during the period covered by this investigation, are 113 percent in the case of clams in 10-ounce tins and 98 percent in the case of clams in 15- and 16-ounce tins.

The draft of the proclamation is being submitted through the Director of the Bureau of the Budget, the Attorney General and

the Department of State, in compliance with Executive order of August 10, 1933.

Respectfully,

ROBERT L. O'BRIEN, *Chairman.*

The PRESIDENT,
The White House.

21 CANNED CLAMS

UNITED STATES TARIFF COMMISSION,
Washington, April 5, 1934.

To the PRESIDENT:

The United States Tariff Commission herein reports the results of an investigation of the differences in costs of production of clams packed in airtight containers and herein also designated as canned clams, in the United States and in the principal competing countries, for the purposes of section 336 of title III of the Tariff Act of 1930, and its findings with respect thereto.

Upon consideration of the facts obtained in this investigation the Commission finds that the present rate of duty fixed by the Tariff Act of 1930, paragraph 721 (b), namely, 35 percent ad valorem, should be reduced in the case of canned razor clams (Siliqua patula) to 23 percent ad valorem, and should be increased in the case of other canned clams and of canned clams in combination with other substances (except clam chowder) to 35 percent ad valorem, assessed on the American selling price of the domestic article. The Commission makes no finding with reference to a change in the duty on clam juice or on clam chowder.

The Commission instituted this investigation on June 28, 1932, in response to an application for an increase in the duty on all canned clams and an application for a decrease in the duty on minced razor clams. Public notice of the hearing was given on the same date. At the public hearing, held on October 5, 1932, in Washington, D. C., parties interested were given reasonable opportunity to be present, to produce evidence, and to be heard, as required by law.

The products covered by paragraph 721 (b) fall, from the standpoint of the competition of imports with domestic production, into three groups as follows:

(1) Canned razor clams.—These are a distinct species produced commercially only on the Pacific coast of the United States and Canada and they command a higher price than other canned clams or clam products.

(2) Other canned clams (put up without admixture with other substances).

(3) Clam juice, and clams or clam juice in combination with other substances.—The most important of these products is clam chowder. There is a large production of clam chowder on the Atlantic coast of the United States; there is practically no importation. Canada is probably the only other country in which canned clam chowder, similar to the domestic product, is produced commercially. By reason of the difficulty of establishing comparability between domestic and foreign clam chowder,
22 and the difficulty of estimating the value of brand reputation, which is a major factor in this trade, the Commission did not investigate the cost of production of clam chowder. Its findings with respect to the duty on "other canned clams" are, however, extended to cover clams in combination with other substances, except clam chowder, in order to prevent evasion of the higher duty on this product by the inclusion therewith of small quantities of other substances. The investigation did not include canned clam juice, which is a by-product of the clam packing industry, and of which there are no imports

FINDINGS OF THE COMMISSION

I. RAZOR CLAMS

1. Under the Tariff Act of 1922 all canned clams were free of duty. By the act of 1930 the duty was fixed at 35 percent ad valorem.

2. Razor clams are found only on the North Pacific coast of North America. The canned domestic product is put up in Washington, Oregon, and Alaska, and the imported product in British Columbia. The domestic production from 1922 to 1928 ranged from about 94,000 to about 142,000 standard cases (48 tins of 5 ounces, drained weight, per case), with no distinct upward or downward tendency. The production has since been considerably smaller, namely, 70,000 cases in 1929, 74,000 in 1930, 77,000 in 1931, and 90,000 in 1932.

3. Imports of razor clams were not distinguished in the trade statistics of the United States before 1931. The export trade statistics of Canada, the only country from which there are imports, indicate that for several years preceding the act of 1930 imports into the United States were increasing until they reached a very considerable proportion, apparently about one-fourth of the domestic consumption, but that after 1929 they declined greatly. According to United States statistics, the imports in 1931 were 96,000 pounds; in 1932, 151,000; and in 1933, 41,000 pounds.

4. Canada is the principal competing country.

5. Costs of production in the United States and Canada were ascertained for the years 1931 and 1932, which are a representative period for the purposes of section 336. The Canadian costs were converted to United States dollars at the rates of exchange prevailing during those years, respectively.

6. Canned razor clams imported from Canada are like or similar to those produced in the United States. The bulk of the production and of the imports consist of 7-ounce tins and 10-ounce tins, and the cost differences with respect to these sizes are representative of the cost differences for all canned razor clams.

7. San Francisco is the principal market in the United States for canned razor clams.

8. Cost difference as ascertained in accordance with section 336:

A. Costs of production of canned razor clams were ascertained from representative producers in the United States and from the only important producer in Canada. These costs cannot be published without disclosing the operations of this single producer.

23 B. Costs of transportation of the domestic and the Canadian product from the centers of production to San Francisco were ascertained and are shown in the attached summary of information.

C. No other relevant factors constituting an advantage or disadvantage in competition were disclosed in the course of the investigation.

The domestic cost of production, including transportation and other delivery charges, to the principal market in the United States, exceeded the corresponding cost of the Canadian article, during the 2-year period covered by the investigation, by $1.06 per case for the clams packed in 7-ounce tins and by $1.54 per case for those packed in 10-ounce tins. The average dutiable value of the imports was $4.82 per case for 7-ounce and $6.40 per case for 10-ounce tins. The excess of domestic over Canadian costs was thus equal to 22 percent of the dutiable value for 7-ounce tins and 24 percent for 10-ounce tins; the average of these two percentages, being the rate of duty necessary to equalize the difference in costs, was 23 percent.

II. OTHER CANNED CLAMS

1. As already stated, all canned clams were free under the Tariff Act of 1922 and are dutiable at 35 percent under the act of 1930.

2. The domestic production of canned clams other than razor clams (not including clam chowder, juice, etc.) has varied con-

siderably from year to year, but for 10 years or more prior to 1932 there was no distinct tendency either upward or downward. The total value of the domestic product was $534,000 in 1930, $534,000 in 1931, and $376,000 in 1932. The decrease in value in 1932 was due primarily to reduced quantities produced. The total output of canned clams other than razor clams was 123,000 cases (about 1,961,000 pounds drained weight) in 1931 and 92,000 cases (about 1,416,000 pounds drained weight) in 1932 (these are cases of varying weight of contents, and the decrease in weight was somewhat less than in the number of cases).

3. Competition of imports is almost exclusively with the Pacific coast production in the United States. The total output of canned clams (other than razor clams) on the Pacific coast in 1931 was 10,135 cases (about 189,000 pounds drained weight), valued at $56,000.

4. The imports of canned clams other than razor clams come almost exclusively from Japan and are sold almost exclusively on the Pacific coast. The imports were not shown separately in the United States statistics prior to 1931. Until 1928 at least they were small as compared with total domestic production, and even as compared with production on the Pacific coast. During the years 1931 to 1933, the imports have greatly exceeded the domestic production on the Pacific coast and have been equal to roughly one-third of the total production of all kinds of canned clams (except razor clams) on both coasts of the United States. They amounted to 960,000 pounds in 1931, 1,333,000 pounds in 1932, and 1,376,000 pounds in 1933.

5. Japan is the principal competing country.

24 6. The years 1931 and 1932 are representative with respect to the domestic cost of production of canned clams and the invoice prices of Japanese canned clams, in terms of Japanese currency. During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or probable future invoice values in terms of dollars. The Commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932. Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932.

7. The production of canned clams in the United States comprises several species or varieties. The largest production is that of canned soft clams on the Atlantic coast; canned soft clams are not produced in Japan, the principal competing country. The imports from Japan are of species of hard clams known in the trade as "white clams" and "baby clams." These species are not produced commercially in the United States, but they are like or similar in use, quality, and price to the littleneck and butter clams (both being hard clams) canned on the Pacific coast of the United States. The Commission selected samples, representative as regards size of container and method of packing, of the domestic product of these two species put up on the Pacific coast, and samples of the imported product which were like or similar thereto. The cost differences found for these selected samples are representative of the cost differences with respect to all canned clams produced in the United States and in the principal competing country.

8. San Francisco is the principal market in the United States for canned hard clams, both domestic and imported.

9. The cost of production, as defined in section 336 (h) (4), was not readily ascertainable for the principal competing country, and the Commission, in accordance with section 336 (e) (2) (A), accepted as evidence thereof the weighted average invoice prices of imports from that country.

10. Costs of production ascertained in accordance with section 336:

A. The average domestic cost of production of the representative samples of canned clams (other than razor clams) during 1931 and 1932 was, for 10-ounce tins, $4.24 per case, and for 16-ounce tins, $5.84 per case. The average cost as evidenced by invoice prices of the like or similar Japanese samples in the same years, converted to dollars at the average exchange rate of 1932, was $1.58 per case for 10-ounce tins and $2.40 per case for 15-ounce tins (containing substantially the same quantity, drained weight, as the domestic 16-ounce tins).

B. The average cost of transportation and other delivery charges for the representative samples from the centers of domestic production to San Francisco during the representative period was $0.26 per case for 10-ounce tins and $0.42 per case for 16-ounce tins. The corresponding cost for the Japanese product was $0.30 per case for 10-ounce tins and $0.37 per case for 15-ounce tins.

C. No other relevant factors constituting an advantage or disadvantage in competition were disclosed during the course of the investigation.

The total cost of production, including transportation and other delivery charges to San Francisco, was thus, for 10-ounce tins, $4.50 per case for the domestic product, and $1.88 per case for the foreign product, the excess of domestic costs being $2.62 per case; and for the larger tins, $6.26 per case for the domestic and $2.77 per case for the foreign product, the excess of domestic costs being $3.49 per case.

The dutiable value of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932, was $1.71 per case for the 10-ounce tins and $2.52 per case for the 15-ounce tins.

The excess of the domestic over the foreign cost as a percentage of the dutiable value of the foreign product, being the ad valorem rate of duty necessary to equalize the difference in costs, was thus 153 percent for the product packed in 10-ounce tins and 138 percent for the product packed in the larger tins.

11. Since the present rate of duty on canned clams is 35 percent on the foreign dutiable value, the rate of duty on foreign value which would be necessary to equalize the difference in costs exceeds the present rate by more than 50 percent thereof. Section 336 (b) of the Tariff Act of 1930 provides that under such circumstances the Commission shall specify "such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g), of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences." It also provides, however, that the rate when applied on the American selling price shall not exceed the rate fixed by statute for application to the foreign dutiable value, in this case 35 percent. Examination of the American selling prices of the representative samples of domestic canned clams shows that the amount of duty resulting from the application of a rate of 35 percent to the American selling price is less than the excess of domestic over foreign costs.

12. The cost difference above set forth is representative of differences in production costs of clams in combination with other substances. As already stated, no cost comparison was made with respect to clam juice or clam chowder. Clam chowder consists of "clams in combination with other substances." It is undesirable, however, to exclude from the application of the increased duty on canned clams every combination of clams with other substances, for the reason that it might then be possible to evade the increase in duty by including with the clams small quantities of other substances, virtually not changing the character of the article. Clam chowder, on the other hand, is familiar in the trade, and although it is made with a variety of ingredi-

ents it can be distinguished from canned clams to which minor quantities of other ingredients have been added. The Commission finds, therefore, that the duty found with respect to canned clams (other than razor clams) should apply to combinations of clams with other substances, except clam chowder.

26 CONCLUSION

The Commission finds it shown by the investigation—

(a) That the duty of 35 percent ad valorem, expressly fixed by statute on clams, clam juice, or either in combination with other substances, packed in airtight containers, does not in the case of clams and of clams in combination with other substances (except clam chowder), packed in airtight containers, equalize the difference in the costs of production, including transportation and other delivery charges to the principal market in the United States, of the domestic articles and the like or similar foreign articles produced in the principal competing countries;

(b) That in the case of razor clams (Siliqua patula), packed in airtight containers, a decrease of 12 percent ad valorem in the rate of duty is necessary to equalize such difference; and

(c) That with respect to razor clams (Siliqua patula), packed in airtight containers, the rate of duty necessary to equalize said difference is 23 percent ad valorem, and that with respect to other clams and to clams in combination with other substances (except clam chowder), packed in airtight containers, the rate of duty necessary to equalize such difference within the limits permitted by section 336 (b) of title III of the Tariff Act of 1930 is 35 percent ad valorem based upon the American selling price of the domestic article.

The Commission makes no finding with respect to (a) clam juice, (b) clam juice in combination with substances other than clams, or (c) clam chowder, all the above packed in airtight containers.

Appended to this statement of findings is a summary of information obtained in the investigation.

Respectfully submitted.

ROBERT L. O'BRIEN,
Chairman.
THOMAS WALKER PAGE,
Vice Chairman.
EDGAR B. BROSSARD.
JOHN LEE COULTER.
Commissioners.

27. SUMMARY OF INFORMATION OBTAINED IN THE COMMISSION'S INVESTIGATION WITH RESPECT TO CLAMS PACKED IN AIRTIGHT CONTAINERS

RATES OF DUTY

Act	Paragraph	Article	Percent ad valorem
1922	1662	* * * other shellfish, fresh, frozen, packed in ice, or prepared or preserved in any manner, and not specially provided for.	Free
1930	721 (b)	Clams, clam juice, or either in combination with other substances, packed in airtight containers.	35

SCOPE OF THE INVESTIGATION

This inquiry is limited to cooked clams packed in airtight containers. The article is referred to in commerce as "canned clams."

Other clam products provided for in paragraph 721 (b) of the Tariff Act of 1930, are clam chowder, clam juice, clam nectar, clam paste, and clam sauce. There are no imports of clam chowder. Clam paste and clam sauce are not produced in the United States, and clam juice and clam nectar are negligible in both domestic production and imports.

With respect to canned clams, the domestic costs of packing were obtained for Pacific coast razor clams, butter clams, and little neck clams. Foreign costs of production were obtained for Canadian razor clams, and invoice prices as evidence of costs of production were obtained for Japanese white clams and baby clams. Costs of transportation to San Francisco, the principal market of competition, were obtained for both the domestic and imported products.

Costs of Atlantic coast clams were not obtained. From 15 to 25 percent of the Atlantic coast pack is shipped to the Pacific coast but the product consists almost entirely of "soft" clams. Imports consist almost entirely of hard clams from Japan and razor clams from British Columbia which respectively compete mainly with domestic Pacific coast hard clams and razor clams.

The articles have been divided into three classes as follows: (1) razor clams (Siliqua patula), (2) other clams, and (3) clam products (juice, chowder, paste sauce).

This report is given in three parts according to the classifications named above.

28

PART 1. RAZOR CLAMS

DESCRIPTION AND USES

The razor clam (Siliqua patula) is one of numerous species of clams put up in tins. It is distinct in color, size, and flavor, and is marketed under the name razor clam. The canned product consists of clam meat packed in clam juice collected during the canning process. The bulk of the pack consists of minced meat. Only the white meat, free of dark-colored portions is used for canning. The tins when filled with meat and juice are sealed and then sterilized at a high temperature. Substantially the same process is followed in preparing the domestic and imported article. Various sizes of tins are used and there is some variation in the relative amount of meat and juice in tins of the same size.

DOMESTIC PRODUCTION

The Pacific razor clam is produced along the beaches of Alaska, Washington, and Oregon, in the vicinities of Cordova, Alaska, Grays Harbor, and Willapa Bay, Wash., and the mouth of the Columbia River. During the canning season of 1932 there were 31 canneries engaged in packing razor clams.

Table 1 shows the domestic production of razor clams from 1921 to 1932.

TABLE 1.—*Razor clams packed in airtight containers: United States production, 1921–32*

Year	Quantity [1]	Value
	Cases	
1921	85,612	$506,591
1922	141,932	876,364
1923	116,773	883,535
1924	125,011	863,126
1925	110,396	869,002
1926	94,459	795,256
1927	130,016	1,046,797
1928	105,280	936,394
1929	69,871	614,130
1930	74,465	673,845
1931:		
Whole:		
No. 1, 5-ounce (48 cans)	3,819	37,808
No. 2, 10-ounce (24 cans)	140	1,260
Other sizes (standard cases)	104	822
Minced:		
½-pound flat, 4-ounce (48 cans)	61,254	427,428
No. 1, 5-ounce (48 cans)	20,712	176,058
No. 2, 10-ounce (24 cans)	1,056	9,188
Other sizes (standard cases)	2,307	21,873
Total	89,392	674,437
Total (standard cases)	77,141	

[1] The quantities shown for the years 1921–30 are standard cases representing the various sized cases converted to the equivalent of 48 no. 1, 5-ounce, tins to the case.

TABLE 1.—*Razor clams packed in airtight containers: United States production, 1921–22*—Continued

Year	Quantity	Value
29		
1932:		
Whole:	*Cases*	
No. 1, 5-ounce (48 cans)	3,716	$34,581
No. 2, 10-ounce (24 cans)		
Other sizes (standard cases)	1,962	14,675
Minced:		
½-pound flat, 4-ounce (48 cans)	91,155	577,134
No. 1, 5-ounce (48 cans)	10,518	88,332
No. 2, 10-ounce (24 cans)	178	1,477
Other sizes (standard cases)	447	2,940S
Total	107,976	718,539
Total (standard cases)	89,745	

Source: Fishery Industries of the United States, Bureau of Fisheries, Department of Commerce.

EXPORTS

United States exports of canned razor clams are negligible.

IMPORTS AND PRINCIPAL COMPETING COUNTRY

Imports of razor clams come entirely from Canada. Annual statistics of United States imports are available for 1931, 1932, and 1933 only, and amounted to 96,000 pounds, 151,312 pounds, and 41,130 pounds, respectively.

According to "Trade of Canada", the exports from Canada to the United States for the fiscal years ended March 31, 1926–30, ranged from 841,600 pounds in 1926 to 1,397,000 pounds in 1930 and averaged 1,070,820 pounds. During the fiscal years ended March 31, 1932 and 1933, the Canadian exports to the United States amounted to only 226,800 pounds and 127,700 pounds, respectively.

Table 2 shows the United States imports from Canada for the calendar years 1931, 1932, and 1933.

TABLE 2.—*Razor clams packed in airtight containers: United States imports from Canada, 1931–33*

Calendar year	Quantity	Value
	Pounds	
1931	96,000	$20,244
1932	151,312	27,224
1933	41,130	7,551

Source: Department of Commerce; monthly statistics of imports for consumption, unpublished.

COMPARABILITY OF DOMESTIC AND IMPORTED RAZOR CLAMS

The Canadian razor clam is the same species and is put up in the same manner as the domestic razor clam, and the two articles sell at substantially the same price in San Francisco, the center of competition. In both Canada and the United States the bulk of the pack consists of minced meat.

Razor clams sell in San Francisco at about double the price of other species. The higher prize of the razor clam is due in part to its light color and the well-established demand for it by name.

Table 3 gives the wholesale prices of canned razor clams in San Francisco in September 1931 and 1932 per case, and the computed price per pound net weight and per pound drained weight.

TABLE 3.—*Razor clams, packed in airtight containers: Wholesale prices in San Francisco, Calif., during September 1931 and 1932*

Item		Canned razor clams	
		Minced, in 7-ounce tins	Whole, in 10-ounce tins
Number of tins per case		48	48
Weight of tin contents:			
Per tin:			
Net	ounces	7	10
Drained	ounces	3.5	5
Per case:			
Net	pounds	21	30
Drained	pounds	10.5	15
Wholesale price in San Francisco in September:			
1931:			
Per case	dollars	7.10	9.12
Per pound:			
Net weight	cents	33.8	30.4
Drained weight	cents	67.6	60.8
1932:			
Per case	dollars	7.11	8.90
Per pound:			
Net weight	cents	33.9	29.7
Drained weight	cents	67.8	59.4

COSTS OF PRODUCTION

Costs of production of canned razor clams were obtained for eight plants in Washington, Oregon, and Alaska for the canning season (April, May, and June) of 1931 and 1932. The plants for which costs were obtained produced 60,970 cases in 1931 and 23,977 cases in 1932, or 68 and 22 percent, respectively, of the total domestic Pacific coast pack of razor clams in each of the 2 years. The total cost was higher in 1932 because of the increased cost of raw clams, the price of which is fixed in advance of the packing season. The other items of cost, taken together, were about the same in both years.

To determine the average costs of production according to sizes of containers the items of cost were allocated as follows:

(1) Raw clams, cans, cases, and labels were charged directly according to the quantities used in each type of pack;

(2) Direct labor, fuel, and power were charged in proportion to the total quantity of clam meat used in each type of pack; and

(3) Overhead expense, including repairs, maintenance, depreciation, interest on investment, insurance, taxes, and officers and office salaries were allocated in proportion to the sales-value ratio of each type of pack, after deducting direct costs.

Costs of production were obtained in Canada for 1931 and 1932 for the only plant engaged in packing razor clams. The costs for this plant were allocated to the various sizes of tins packed in the same manner as domestic costs.

31 As publication of costs of production of razor clams would disclose individual enterprise they are not included in this report.

MARKETS AND TRANSPORTATION COSTS

California is the principal market for domestic and imported canned razor clams, and San Francisco is the center of competition. The Canadian product and the bulk of the domestic are shipped to San Francisco by combination rail and steamer.

Table 4 summarizes the costs of transportation and other delivery charges from points of production to San Francisco; detailed statistics are given in the statistical appendix.

TABLE 4.—*Razor clams packed in airtight containers: Costs of transportation and other delivery charges from centers of production to San Francisco, Calif., 1931 and 1932*[1]

Item	Tins per case	Cost per case	
		1931	1932
Domestic razor clams:	*Number*	*Cents*	*Cents*
Minced, in tins of—			
7 ounces net	48	28.15	28.15
10 ounces net	48	32.01	32.01
20 ounces net	24	30.39	30.39
Whole, in tins of—			
20 ounces net	48	34.81	34.81
36 ounces net	48	49.94	49.94
104 ounces net	6	39.89	39.89
Canadian razor clams:			
Minced, in tins of—			
7 ounces net	48	41.26	41.26
10 ounces net	48	41.26	41.26

[1] For detailed statistics of transportation costs and other delivery charges see statistical appendix, p. 23.

PART II. OTHER CLAMS

DESCRIPTION AND USES

Numerous species of clams other than razor clams are put up in tins. Some of the species used are distinct in color, size, and flavor, and are marketed under names which identify them either specifically or generally. Outstanding classes of domestic clams, other than the razor clam of the Pacific Northwest, are the soft clam of New England, and various species of hard clams, found along the entire coast. The so-called "white" clam and "baby" clam of Japan constitute about 99 percent of imports, excluding razor clams.

Small clams are usually packed whole: intermediate sizes, with the entrails removed; and large sizes, minced. All clams are packed in clam juice collected during the canning process. Substantially the same process is followed in preparing the domestic and imported articles. The meat is packed in clam juice in tins, sealed, and sterilized in retorts. Various sizes of tins are used and there is some variation in the relative amount of meat and juice in tins of the same size.

A more detailed discussion of species and grades is given under "Comparability of Domestic and Imported Claims."

DOMESTIC PRODUCTION

In 1931 the domestic production of canned clams (excluding razor clams) was 122,842 cases, valued at $533,759, divided as follows:

	Cases	Value
Pacific hard clams	10,135	$56,260
Atlantic soft clams	93,938	342,763
Atlantic hard clams	18,769	134,736
Total	122,842	533,759

As noted under "Scope of the Investigation," Pacific hard clams are the domestic products which compete mainly with imports from Japan. Pacific hard clams are produced along the beaches of Puget Sound, Wash., and Alaska. During the canning season of 1932 there were seven canneries engaged in packing hard clams on the Pacific coast.

Table 5 gives the value of domestic production of canned clams (except razor clams) from 1921 to 1932; table 6 gives detailed statistics of the domestic pack of clams (except razor clams) in 1931 and 1932; and table 7 gives detailed statistics of the domestic Pacific coast pack of hard clams in 1931.

33 TABLE 5.—*Clams (except razor clams) packed in airtight containers: Value of domestic production, 1921–32*

Year	Hard clams	Soft clams	Total	Year	Hard clams	Soft clams	Total
1921	$138,699	$338,775	$477,474	1927	$231,526	$270,747	$502,273
1922	201,270	327,287	528,557	1928	203,959	318,510	522,469
1923	194,937	308,560	503,497	1929	259,435	321,386	580,821
1924	271,911	459,882	731,793	1930	192,740	341,035	533,775
1925	218,601	287,073	505,674	1931	190,906	342,763	533,759
1926	197,044	279,996	471,040	1932	106,400	269,231	375,631

Source: Fishery Industries of the United States.

TABLE 6.—*Clams (except razor clams) packed in airtight containers: Detailed statistics of United States production in 1931 and 1932* [1]

Items and States	1931		1932	
	Cases	Value	Cases	Value
Hard clams (Rhode Island, New York, New Jersey, Georgia, Florida, Washington, and Alaska):				
Whole:				
No. 1, 5-ounce (48 cans)	4,670	$39,833		
1-pound 8-ounce (48 cans)	3,133	21,751	1,032	$6,846
No. 2, 10-ounce (24 cans)	7,700	48,312	2,832	17,654
No. 10, 52-ounce (6 cans)	4,250	21,250	1,817	8,368
Other sizes (standard cases)	763	3,879	2,145	16,590
Minced:				
½-pound 4-ounce (48 cans)			4,091	15,703
No. 1, 5-ounce (48 cans)	908	6,801	986	5,380
No. 2, 10-ounce (24 cans)	1,483	10,383		
Other sizes (standard cases)	5,997	38,787	5,456	35,859
Total	28,904	190,996	18,359	106,400
Soft clams (Maine and Massachusetts):				
Whole:				
No. 1, 5-ounce (48 cans)	66,333	240,763	56,791	209,786
1-pound, 8-ounce (48 cans)	7,945	46,734	3,040	13,830
No. 2, 10-ounce (24 cans)	10,159	34,473	10,486	30,522
Other sizes (standard cases)	9,301	20,793	3,529	15,093
Total	93,938	342,763	73,846	269,231
Grand total	122,842	533,759	92,205	375,631

[1] Source: United States Bureau of Fisheries, Statistical Bulletins Nos. 977 and 1026. "Standard cases" represent the various sized cases converted to the equivalent of 48 No. 1, 5-ounce, cans to the case. In 1932 hard clams were canned at 1 plant in Massachusetts, 1 in Rhode Island, 5 in New York, 1 in New Jersey, 1 in Florida, 6 in Washington, and 1 in Alaska; soft clams at 17 plants in Maine and 1 in Massachusetts; and coquina clams at 2 plants in Florida.

TABLE 7.—*Hard clams packed in airtight containers: United States Pacific coast production, 1931*

Type of pack and size of tin [1]	Tins per case	Quantity	Value
Hard clams:			
Minced:	*Number*	*Cases*	
Flat, 8-ounce	48	305	$1,333
No. 1, 10-ounce E. O	48	457	2,623
No. 2, 20-ounce	24	128	612
Whole:			
Flat, 8-ounce	48	203	893
No. 1, 10-ounce E. O	48	495	2,718
16-ounce	48	2,301	15,979
No. 2, 20-ounce	24	2,098	10,070
No. 10, 104-ounce	6	4,243	22,032
Total		10,135	56,260

[1] The weight of the tin contents here shown is the net weight (not the drained weight).

United States exports of canned clams are negligible.

IMPORTS AND PRINCIPAL COMPETING COUNTRY

Japan is the chief source of imports of canned clams. In 1933 Japan supplied 94 percent of the total value of imports and 99½ percent of the total value, excluding razor clams. The imports from Japan are chiefly baby clams and white clams.

Table 8 gives the available statistics on imports of canned clams, except razor clams, from 1926 to 1933.

TABLE 8.—*Clams and clam products packed in airtight containers (except razor clams): United States imports, 1926–33*

Calendar year	Japan		Other countries		Total		Rate of duty	Value of imports per pound
	Quantity	Value	Quantity	Value	Quantity	Value		
	Pounds		*Pounds*		*Pounds*		*Percent*	*Cents*
1926	None		Small	(1)	Small	(1)	Free	(1)
1927	Small	(1)	Small	(1)	Small	(1)	Free	(1)
1928		[2]$30,000	Small	(1)	(1)	(1)	Free	(1)
1929–30	(1)	(1)	(1)	(1)	(1)	(1)	Free	(1)
1931 [3]	947,438	121,232	12,858	$2,612	960,296	$133,844	35	13.9
1932 [3]	1,312,442	125,598	20,140	949	1,332,582	126,547	35	9.5
1933 [3]	1,371,278	123,788	4,907	517	1,376,185	424,305	35	9.0

[1] No data available.
[2] Estimated by importers.
[3] Source: Monthly statistics of imports for consumption, unpublished.

COMPARABILITY OF DOMESTIC AND IMPORTED CLAMS

The domestic production of canned clams (except razor clams) falls into two general classes:

1. The Atlantic and Gulf pack of hard and soft clams.
2. The Pacific coast pack of hard clams (little-neck and butter).

The bulk of imports into the United States comes from Japan and consists of baby clams and white clams entered at San Francisco where they meet in competition with the domestic Pacific coast pack of hard clams. The shipments of Atlantic coast clams to San Francisco consist almost entirely of soft clams packed in Maine. They usually sell for a lower price than the domestic Pacific coast hard clams and there are no imports into the Pacific coast of soft clams.

Before the depreciation of Japanese currency, imports from Japan sold at wholesale in San Francisco for about the same price as domestic hard clams (little-neck and butter clams). The Japanese articles, however, are sold more extensively for household use.

Although Japanese baby and white clams and the domestic little-neck and butter clams serve the same purposes and sell at about the same price, there are intrinsic differences in the species and in the physical condition of the clams when packed. The Japanese clams are packed whole;[1] the domestic little-neck and butter clams consist of meat only and part of the pack is minced. There are minor differences in size, color, and flavor, which to some extent are reflected in prices.

Table 9 gives the wholesale prices of canned clams (except razor clams) in San Francisco in September 1931 and 1932 per case, and the computed price per pound net weight and per pound drained weight.

TABLE 9.—*Clams, packed in airtight containers (except razor clams): Wholesale prices in San Francisco, Calif., during September 1931 and 1932*

Source, species, and grade[1]	Tins per case	Weight of tin contents				Wholesale price San Francisco, September—					
		Per tin		Per case		1931			1932		
							Per pound			Per pound	
		Net	Drained weight	Net	Drained weight	Per case	Net weight	Drained weight	Per case	Net weight	Drained weight
		Oz.	*Oz.*	*Lb.*	*Lbs.*		*Cents*	*Cents*		*Cents*	*Cents*
Domestic little neck:											
Whole, 16-ounce net	48	16	8	48.0	24.0	$7.54	15.7	31.4	$6.94	14.5	29.0
Whole, 100-ounce net	6	100	50	37.5	18.7	5.71	15.2	30.5	5.06	13.5	27.0
Domestic butters:											
Minced, 8-ounce net	48	8	4	24.0	12.0	(2)	(2)	(2)	4.40	18.3	36.6
Whole, 16-ounce net	48	16	8	48.0	24.0	7.00	14.6	29.2	6.60	13.8	27.6
Whole, 100-ounce net	6	100	50	37.5	18.7	5.19	13.8	27.8	4.64	12.4	24.8
Japanese baby:											
Whole, 10-ounce net	48	10	5	30.0	15.0	4.54	15.1	30.3	3.36	11.2	22.4
Whole, 15-ounce net	48	15	8	45.0	24.0	6.65	14.8	27.7	5.50	12.2	22.9
Whole, 30-ounce net	24	30	16	45.0	24.0	6.50	14.4	27.1	5.15	11.4	22.5
Japanese white:											
Whole, 15-ounce net	48	15	8	45.0	24.0	6.96	15.5	29.0	5.50	12.2	22.9

[1] The domestic article is usually referred to by type of container or net weight of contents; the Japanese usually by drained weight of contents. The basis for comparison is given in columns 3 and 4 under net and drained weight per tin.
[2] No data available.

DOMESTIC COSTS OF PRODUCTION

Costs of production of canned little neck and butter clams were obtained for the three plants engaged in packing these species on the Pacific coast during 1931 and 1932. The principal items of cost, raw clams and labor, declined in 1932, but most of the other items of cost increased mainly because the quantity packed in 1932 was less than half the quantity packed in 1931. The total cost was slightly higher in 1932.

[1] There are small imports of minced Hokki clams from Japan for consumption by orientals.

To determine the average costs of production according to sizes of containers the items of cost were allocated as follows:

(1) Raw clams, cans, cases, and labels were charged directly according to the quantities used in each type of pack;

(2) Direct labor, fuel, and power were charged in proportion to the total quantity of clam meat used in each type of pack; and

(3) Overhead expense, including repairs, maintenance, depreciation, interest on investment, insurance, taxes, and officers and office salaries were allocated in proportion to the sales value ratio of each type of pack, after deducting direct costs.

36 Table 10 gives a summary of the costs of production of canned clams (except razor clams) on the Pacific coast of the United States in 1931 and 1932; detailed statistics of costs are given in the statistical appendix.

TABLE 10.—*Clams (except razor clams) packed in airtight containers: Costs of production on the Pacific coast of the United States in 1931 and 1932*[1]

Species, type of pack, and net weight of tins	Tins per case	Cost per case		
		1931	1932	Average
Butter clams:				
Minced, in tins of—				
7 ounces net	48	$3.029	$3.522	$3.276
8 ounces net	48	3.124	3.558	3.341
10 ounces net	48	4.058	4.252	4.155
16 ounces net	48	6.150	6.400	6.275
20 ounces net	24	3.734	3.678	3.706
Whole, in tins of—				
16 ounces net	48	5.342	5.989	5.666
20 ounces net	24	3.367	3.966	3.666
100 ounces net	6	3.693	4.106	3.900
Little-neck clams:				
Whole, in tins of—				
8 ounces net	48	3.062	3.552	3.307
10 ounces net	48	4.306	4.254	4.280
16 ounces net	48	5.791	6.387	6.089
20 ounces net	24	3.825	4.297	3.961
100 ounces net	6	4.276	4.490	4.383
All clams in tins of—				
10 ounces net	48	4.223	4.253	4.238
16 ounces net	48	5.577	6.096	5.836

[1] Detailed statistics showing items of cost are given in the statistical appendix.

FOREIGN COSTS OF PRODUCTION

As costs of raw material and packing in Japan, the principal source of imports, were not readily ascertainable, the Commission analyzed records of imports entered at San Francisco, the principal port of entry, for the 22-month period, December 1, 1930, to September 30, 1932, for the purpose of obtaining average import prices as evidence of Japanese costs of production.

Table 11 gives the dutiable value and packed value of canned clams in Japan for the period December 1, 1930, to September 30, 1932.

37 TABLE 11.—*Clams packed in airtight containers: Dutiable value and packed value in Japan per case of 48 tins, Dec. 1, 1930, to Sept. 30, 1932*[1]

[The average rate of exchange for the year 1932 was $0.2811]

Period and item	Drained weight of tin contents	Cases included in analysis	Value per case of 48 tins					
			Dutiable value			Packed value		
			In Japanese currency	Converted to United States currency		In Japanese currency	Converted to United States currency	
				At prevailing rate of exchange on date of exportation	At average rate of exchange for the year 1932		At prevailing rate of exchange on date of exportation	At average rate of exchange for the year 1932
12 months ended Nov. 30, 1931:								
Whole baby clams in tins containing—	*Ounces*	*Number*	*Yen*			*Yen*		
10 ounces net weight	5	10,550	6.0824	$3.4034	$1.7098	5.6387	$2.7843	$1.5851
15 ounces net weight	8	400	8.6366	4.2647	2.4279	8.6063	4.2497	
Whole white clams in tins containing—								
10 ounces net weight	5	500	6.5115	3.2153	1.8305	6.5115	3.2153	1.8305
15 ounces net weight	8	2,600	8.9645	4.4265	2.5200	8.3753	4.1356	2.3544
10 months ended Sept. 30, 1932:								
Whole baby clams in tins containing—								
10 ounces net weight:								
December	5	663	6.7095	2.9162	1.8860	6.7095	2.7843	1.5851
January	5	1,673	5.6065	2.0176	1.5761	5.0295	1.8100	1.4139
February	5	100	6.0018	2.0400	1.6872	6.0018	2.0400	1.6872
March	5	300	5.9268	1.9058	1.6661	5.9268	1.9058	1.6661
April–August			(2)	(2)	(2)	(2)	(2)	(2)
September	5	1,500	6.0809	1.4394	1.7122	5.3600	1.2686	1.5088
Whole white clams in tins containing—								
15 ounces net weight:								
December	8	350	9.5270	4.1494	2.6779	9.4211	4.0948	2.6484
January	8	(2)	(2)	(2)	(2)	(2)	(2)	(2)
February	8	197	8.8392	3.0339	2.4848	8.9080	3.0784	2.5213
March–September		(2)	(2)	(2)	(2)	(2)	(2)	(2)
Weighted average, baby and white clams in tins containing—								
10 ounces net weight	5	15,286	6.0688	2.7175	1.7060	5.6277	2.5266	1.5820
15 ounces net weight	8	3,547	8.9746	4.3027	2.5233	8.5375	4.0858	2.4000

[1] Based on an analysis of imports at San Francisco for 22 months, Dec. 1, 1930, to Sept. 30, 1932, covering entries having a dutiable value of $64,176 of which $44,821 or 70 percent was baby clams; $15,164 or 24 percent white clams; and $5,799 or 6 percent nonspecified imports. Of the baby clams $39,932 or 89 percent was packed in 5-ounce tins (10 ounces net weight); $1,706 or 4 percent in 8-ounce tins (15 ounces net weight); and $2,992 or 7 percent in 10-ounce tins; of the white clams $1,608 or 11 percent was packed in 5-ounce tins (10 ounces net weight), and $13,556 or 89 percent in 8-ounce tins (15 ounces net weight).

[2] Negligible imports.

MARKETS AND TRANSPORTATION COSTS

California is the principal market for domestic and imported canned clams, and San Francisco is the center of competition. Shipments to San Francisco from Japan are made directly by

steamer; the bulk of the domestic moves by combination rail and steamer.

Table 12 summarizes the costs of transportation and other delivery charges from points of production to San Francisco; detailed statistics are given in the statistical appendix. Those items of transportation and delivery which were expressed in yen have been converted to dollars at the average rate of exchange for the year 1932, namely $0.2811.

38 TABLE 12.—*Clams (except razor clams) packed in airtight containers: Costs of transportation and other delivery charges from centers of production to San Francisco, Calif., 1931 and 1932* [1]

Source, species, condition, and net content of tin	Tins per case	Cost per case	
		1931	1932
Domestic butter clams:			
Minced, in tins of—	*Number*	*Cents*	*Cents*
7 ounces net	48	25.97	25.97
8 ounces net	48	26.05	26.05
10 ounces net	48	25.94	25.94
16 ounces net	48	41.66	41.66
20 ounces net	24	26.03	26.03
Whole, in tins of—			
16 ounces net	48	41.58	41.58
20 ounces net	24	26.03	26.03
100 ounces net	6	31.17	31.17
Domestic little-neck clams:			
Whole, in tins of—			
8 ounces net	48	25.97	25.97
10 ounces net	48	26.17	26.17
16 ounces net	48	41.71	41.71
20 ounces net	24	26.05	26.05
100 ounces net	6	31.27	31.27
Japanese baby clams:			
Whole, in tins of—			
10 ounces net	48	29.13	32.14
15 ounces net	48	38.51	(2)
Japanese white clams:			
Whole, in tins of—			
10 ounces net	48	30.60	(2)
15 ounces net	48	38.12	27.58

[1] For detailed statistics of transportation costs and other delivery charges see statistical appendix.
[2] No data available.

COMPARATIVE COSTS

Table 13 shows for selected grades of domestic and imported hard clams the costs of production and transportation and the amount of duty necessary to equalize cost differences. The Japanese costs (as evidenced by invoice prices), and the dutiable values, have been converted from yen to dollars at the average rate of exchange for the year 1932, namely, $0.2811.

TABLE 13.—*Clams (except razor clams), packed in airtight containers: Summary of cost comparison, 1931 and 1932*

Item	Per case containing 48 tins of—	
	10 ounces net weight	15–16 ounces net weight
Domestic cost:		
At factory	$4.24	$5.84
Transportation and other delivery charges	.26	.42
Total	4.50	6.26
Foreign cost:		
At factory (as evidenced by invoice values)	1.58	2.40
Transportation and other delivery charges	.30	.37
Total	1.88	2.77
Excess of domestic cost	2.62	3.49
Dutiable value of foreign product	1.71	2.52
Rate of duty necessary to equalize costs (based on dutiable value of foreign product) percent	153	138
American selling price of domestic product	$5.51	$7.02
Rate of duty necessary to equalize costs (based on American selling price of domestic product) percent	48	50

39 RATES OF EXCHANGE

The par value of the Japanese yen in terms of United States dollars is $0.4985. Japan went off the gold standard on December 13, 1931, and the value of the yen declined steadily until November 1932, when it was worth only $0.2062. Since then it has increased in value.

Table 14 shows the average monthly value of Japanese currency for the years 1931, 1932, and 1933.

TABLE 14.—*Japanese yen in terms of United States dollars, 1931–33*

Month	Year			Month	Year		
	1931	1932	1933		1931	1932	1933
January	$0.4944	$0.3599	$0.2074	August	$0.4935	$0.2449	$0.2690
February	.4941	.3432	.2079	September	.4934	.2363	.2725
March	.4937	.3216	.2126	October	.4925	.2306	.2777
April	.4936	.3281	.2369	November	.4930	.2062	.3036
May	.4938	.3197	.2400	December	.4346	.2073	.3074
June	.4937	.3039	.2576				
July	.4936	.2745	.2877	Average	.4885	.2811	.2565

Source: Federal Reserve Bulletin.

40 PART III. CLAM PRODUCTS

(Juice, Chowder, Paste, Sauce)

PRODUCTION, IMPORTS, AND EXPORTS

Clam products packed in airtight containers consist of clam chowder, clam juice, clam nectar, clam paste, and clam sauce.

There are no imports of clam chowder and exports are negligible. Clam paste and clam sauce are not produced in the United States, the limited domestic consumption being supplied entirely by imports. Clam juice and clam nectar are by-products of the clam-canning industry. Imports, if any, probably come from Canada. It is believed, however, that consumption is limited to the domestic product.

Domestic production of canned clam products (other than canned clams) packed in airtight containers is limited to clam chowder, clam juice, clam cocktail, clam broth, and clam bouillon. Clam chowder is the product of major importance; the other articles are by-products of the clam-canning and clam chowder-canning industry.

Most of the production of clam chowder is from hard and soft clams, and the industry is confined almost entirely to the Atlantic and Gulf coasts. The other clam products are packed wherever clams or clam chowder are produced.

Table 15 shows detailed statistics of United States production of clam products for the years 1931 and 1932. Statistics covering imports and exports are not available. Imports are known to be small.

No domestic or foreign costs of these products were obtained by the Commission.

TABLE 15.—*Clam products (except clams) packed in airtight containers. Detailed statistics of United States production in 1931 and 1932* [1]

Item and States		1931		1932	
		Cases	Value	Cases	Value
Razor clams (Washington, Oregon, and Alaska):					
Juice:					
All sizes (standard cases)		364	$1,120	537	$1,886
Hard clams (Rhode Island, New York, New Jersey, Georgia, Florida, Washington, and Alaska): [2]					
Chowder:					
No. 1, 10-ounce	48 cans	163,857	604,266	79,209	285,568
33-ounce	24 jars	133	1,319	12,457	89,625
No. 10, 102-ounce	6 cans			1,957	12,017
Other sizes	standard cases	56,291	234,384	24,219	121,331
Juice:					
No. 1, 10-ounce	48 cans	527	1,716	906	5,878
No. 10, 102-ounce	6 cans	1,697	5,489	1,791	6,663
Other sizes	standard cases	3,223	17,625	2,120	9,208
Cocktail:					
3- and 4-ounce	48 jars	1,092	7,374	535	2,300
8 ounce	24 jars	249	1,387		
Other sizes	standard cases	216	2,513	407	3,891
Broth and bouillon: [3]					
3½- and 4-ounce	48 jars	209	1,302	(3)	(3)
10-ounce	48 jars	1,148	6,411	(3)	(3)
Other sizes	standard cases	3,082	16,311	4,279	25,002
Total		231,814	900,097	127,880	561,483

[1] Source: United States Bureau of Fisheries, Statistical Bulletins Nos. 977 and 1026. "Standard cases" represent the various size cases converted to the equivalent of 48 No. 1, 10-ounce cans to the case.

[2] Includes a small amount of coquina broth packed in Florida.

[3] Included with "Other sizes."

TABLE 15.—*Clam products (except clams) packed in airtight containers: Detailed statistics of United States production in 1931 and 1932*—Con.

Item and States		1931		1932	
		Cases	Value	Cases	Value
4: Soft clams (Maine and Massachusetts):					
Chowder: 3					
No. 1, 10-ounce	48 cans	17,082	$53,856	13,331	$45,653
No. 2, 20-ounce	24 cans	1,132	3,923		
33-ounce	24 cans			12,225	37,286
Other sizes	standard cases	27,180	54,898	7,932	37,918
Bouillon and juice:					
No. 2, 20-ounce	24 cans	5,788	16,419	3,117	5,900
Other sizes	standard cases	8,951	24,400	5,394	12,706
Total		60,133	147,496	41,999	139,463
Grand total		292,311	1,048,713	170,416	702,832

43

APPENDIXES

APPENDIX I

STATISTICAL DATA

Detailed statistics of costs of production are given in the following tables:

Table 16. Domestic costs of little-neck and butter clams in 1931.

Table 17. Domestic costs of little-neck and butter clams in 1932.

Table 18. Domestic costs of transporting razor clams in 1931 and 1932.

Table 19. Domestic costs of transporting little-neck and butter clams in 1931 and 1932.

Table 20. Japanese costs of transporting baby and white clams from December 1, 1930, to September 30, 1932.

Table 21. Canadian costs of transporting razor clams in 1931 and 1932.

Table 22. Production and shipments to the Pacific coast of clams packed in Maine.

TABLE 16.—*Canned hard clams, domestic Pacific coast: Costs of production per case (excluding transportation), 1931*

Item	Minced butter clams					Whole butter clams			Whole little-neck clams				
	7-ounce tins, 48 to case (½ flat)	8-ounce tins, 48 to case (buffet)	10-ounce tins, 48 to case (no. 1 E.O.)	16-ounce tins, 48 to case (salmon)	20-ounce tins, 24 to case (no. 2 tall)	16-ounce tins, 48 to case (salmon)	20-ounce tins, 24 to case (no. 2 tall)	100-ounce tins, 6 to case (no. 10)	8-ounce tins, 48 to case (buffet)	10-ounce tins, 48 to case (no. 1 E.O.)	16-ounce tins, 48 to case (salmon)	20-ounce tins, 24 to case (no. 2 tall)	100-ounce tins, 6 to case (no. 10)
Costs:													
Materials and supplies:													
Clams	$0.548	$0.652	$0.667	$1.323	$1.126	$1.495	$0.833	$1.132	$0.650	$0.886	$1.668	$0.794	$1.221
Cans	.924	.776	.820	1.087	.622	1.069	.623	.441	.796	.884	1.062	.640	.338
Labels	.141	.134	.145	.097	.060	.128	.086	.017	.144	.118	.124	.055	.014
Cases	.120	.120	.148	.173	.135	.180	.136	.151	.120	.155	.179	.143	.151
Factory operations:													
Labor	.618	.648	.782	1.503	.805	1.281	.806	.971	.685	.836	1.303	.869	1.070
Fuel	.033	.036	.086	.453	.083	.105	.061	.081	.038	.081	.127	.080	.112
Overhead:													
Repairs and maintenance	.010	.031	.067	.060	.039	.029	.017	.021	.000	.059	.046	.030	.044
Officers' and office salaries	.264	.229	.346	.467	.246	.363	.288	.310	.259	.359	.388	.269	.335
Rent			.066	.163	.032	.037	.027	.031		.052	.063	.075	.093
Insurance	.048	.041	.065	.093	.046	.066	.054	.058	.047	.067	.073	.059	.066
Taxes	.133	.135	.186	.187	.133	.177	.137	.149	.180	.193	.190	.129	.149
Depreciation	.044	.102	.238	.267	.138	.120	.079	.094	.043	.210	.181	.138	.188
Interest on investment	.056	.155	.347	.347	.201	.161	.102	.122	.055	.306	.251	.178	.252
Miscellaneous	.087	.045	.095	.230	.068	.129	.108	.115	.086	.100	.136	.134	.143
Total cost per case	3.029	3.124	4.058	6.150	3.734	5.342	3.367	3.693	3.062	4.306	5.791	3.625	4.276

45 TABLE 17.—*Canned hard clams, domestic Pacific coast: Costs of production per case (excluding transportation), for the first 8 months of 1932*

Item	Minced butter clams					Whole butter clams			Whole little-neck clams				
	7-ounce tins, 48 to case (½ flat)	8-ounce tins, 48 to case (buffet)	10-ounce tins, 48 to case (no. 1 E. O.)	16-ounce tins, 48 to case (salmon)	20-ounce tins, 24 to case (no. 2 tall)	16-ounce tins, 48 to case (salmon)	20-ounce tins, 24 to case (no. 2 tall)	100-ounce tins, 6 to case (no. 10)	8-ounce tins, 48 to case (buffet)	10-ounce tins, 48 to case (no. 1 E. O.)	16-ounce tins, 48 to case (salmon)	20-ounce tins, 24 to case (no. 2 tall)	100-ounce tins, 6 to case (no. 10)
Costs:													
Materials and supplies:													
Clams	$0.292	$0.381	$0.522	$0.827	$0.540	$0.860	$0.370	$0.809	$0.378	$0.521	$0.834	$0.520	$0.746
Cans	.920	.792	.890	1.047	.624	1.063	.626	.439	.793	.889	1.062	.626	.440
Labels	.144	.144	.149	.080	.072	.112	.046	.010	.144	.129	.108	.042	.011
Cases	.110	.110	.110	.180	.123	.186	.148	.176	.110	.150	.187	.153	.173
Factory operations:													
Labor	.720	.826	.836	1.067	1.025	1.332	.618	.856	.822	.831	1.294	.684	.891
Fuel	.098	.078	.088	.127	.097	.140	.070	.102	.078	.088	.138	.091	.103
Overhead:													
Repairs and maintenance	.057	.055	.105	.227	.054	.142	.147	.126	.055	.107	.179	.161	.152
Officers' and office salaries	.547	.530	.565	.900	.517	.782	.640	.502	.530	.564	.925	.642	.643
Rent	.231	.224	.174	.200	.218	.248	.159	.112	.224	.173	.277	.143	.155
Insurance	.101	.097	.087	.120	.095	.123	.090	.067	.097	.087	.141	.086	.089
Taxes	.125	.121	.173	.333	.118	.236	.223	.184	.121	.174	.290	.236	.227
Depreciation	.091	.088	.231	.533	.086	.307	.343	.298	.088	.234	.397	.381	.356
Interest on investment	.116	.112	.299	.693	.109	.398	.446	.388	.112	.303	.514	.496	.462
Miscellaneous			.023	.066		.030	.040	.036		.024	.041	.046	.042
Total cost per case	3.522	3.558	4.252	6.409	3.678	5.989	3.966	4.106	3.552	4.254	6.387	4.297	4.490

46 TABLE 18.—*Razor clams packed in airtight containers, United States Pacific coast: Weighted average costs of transportation from points of production where costs were obtained to San Francisco, Calif., 1931–32*

Item	Minced razor clams			Whole razor clams		
	7-ounce tins, 48 to case	10-ounce tins, 48 to case	20-ounce tins, 24 to case	10-ounce tins, 48 to case	16-ounce tins, 48 to case	104-ounce tins, 6 to case
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Wharfage [1]	1.05					
Transportation from shipping point to steamer connection [2]	9.20	9.56	9.00	10.68	16.25	12.50
Transfer charge at steamer connection	1.11	2.31	3.00	3.49	5.42	4.14
Transportation from connecting points to San Francisco	10.50	13.43	11.88	13.86	21.45	16.50
Marine insurance	1.15	1.50	1.33	1.57	1.50	1.50
Toll at San Francisco	.16	.21	.18	.21	.32	.25
Hauling to warehouse	5.00	5.00	5.00	5.00	5.00	5.00
Total transportation costs:						
Per case	28.15	32.01	30.39	34.81	49.94	39.89
Per can	.59	.67	1.27	.73	1.04	6.65
Per pound net weight	1.34	1.07	1.01	1.16	1.04	1.07

[1] Includes wharfage at Cordova, Alaska, and Seattle, Wash.
[2] Steamer connections at Seattle, Wash., and Portland and Astoria, Oreg.

TABLE 19.—*Butter and little-neck clams packed in airtight containers, United States Pacific coast: Weighted average costs of transportation from points of production where costs were obtained to San Francisco, Calif., 1931–32*

MINCED BUTTER CLAMS

Item	7-ounce tins, 48 to case	8-ounce tins, 48 to case	10-ounce tins, 48 to case	16-ounce tins, 48 to case	20-ounce tins, 24 to case	100-ounce tins, 6 to case
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Transportation costs from cannery to Seattle, Wash	8.80	8.80	8.80	12.33	8.80	
Transportation costs from Seattle, Wash., to San Francisco, Calif	11.20	11.20	11.20	19.67	11.20	
Marine insurance	.77	.85	.74	[illegible]	.83	
Harbor toll	.20	.20	.20	.33	.20	
Hauling to warehouse	5.00	5.00	5.00	5.00	5.00	
Total transportation costs:						
Per case	25.97	26.05	25.94	41.66	26.03	
Per can	.54	.54	.54	.87	1.08	
Per pound net weight	1.24	1.09	.86	.87	.87	

WHOLE BUTTER CLAMS

Transportation costs from cannery to Seattle, Wash				15.40	8.80	11.00
Transportation costs from Seattle, Wash., to San Francisco, Calif				19.90	11.20	14.00
Marine insurance				1.23	.83	.92
Harbor toll				.35	.20	.25
Hauling to warehouse				5.00	5.00	5.00
Total transportation costs:						
Per case				41.88	26.03	31.17
Per can				.87	1.08	5.19
Per pound net weight				.87	.87	.83

TABLE 19.—*Butter and little-neck clams packed in airtight containers, United States Pacific coast: Weighted average costs of transportation, etc.*—Con.

WHOLE LITTLE-NECK CLAMS

Item	7-ounce tins, 48 to case	8-ounce tins, 48 to case	10-ounce tins, 48 to case	16-ounce tins, 48 to case	20-ounce tins, 24 to case	100-ounce tins, 6 to case
Transportation costs from cannery to Seattle, Wash		8.80	8.80	13.40	8.80	11.00
Transportation costs from Seattle, Wash., to San Francisco, Calif		11.20	11.20	19.60	11.20	14.00
Marine insurance		.77	.86	1.36	.85	1.02
Harbor toll		.20	.21	.35	.20	.25
Hauling to warehouse		5.00	5.00	5.00	5.00	5.00
Total transportation costs:						
Per case		25.97	26.17	41.71	26.05	31.27
Per can		.54	.55	.87	1.09	5.21
Per pound net weight		1.08	.87	.87	.87	.83

47 TABLE 20.—*Clams packed in airtight containers: Costs of transportation and other delivery charges (excluding duty) on shipments from centers of production in Japan to San Francisco, Calif., Dec. 1, 1930, to Sept. 30, 1932*[1]

Item	Dec. 1, 1930, to Nov. 30, 1931	Dec. 1, 1931, to Sept. 30, 1932	Weighted average cost
	Cost per case of 48 10-ounce tins		
	Cents	*Cents*	*Cents*
Cartage and stowage	2.65	1.68	2.38
Ocean freight	9.72	18.56	12.17
Marine insurance	.48	.50	.49
Buying commission	9.13	4.37	7.81
Consular fee	.87	.78	.84
Customs broker fee	1.34	1.25	1.32
Cartage to store	5.00	5.00	5.00
Total	29.19	32.14	30.01
	Cost per case of 48 15-ounce tins		
Cartage and stowage	4.26	3.92	4.20
Ocean freight	12.49	14.18	12.74
Marine insurance	.51	.97	.75
Buying commission	13.50	9.48	11.65
Consular fee	.87	.78	.86
Customs broker fee	1.34	1.25	1.33
Cartage to store	5.00	5.00	5.00
Total	38.17	27.58	36.53

[1] For details concerning source, see table 21, p. 17.

TABLE 21.—*Clams packed in airtight containers: Costs of transportation and other delivery charges (excluding duty) on shipments from Masset, British Columbia, to San Francisco, Calif., 1931 and 1932*

Item of cost	Cost per case of 48 tins	Item of cost	Cost per case of 48 tins
Freight		Freight—Continued.	
Masset to Vancouver, British Columbia	*Cents* 9.45	Insurance, consular fee, and customs broker's entry fee	*Cents* 3.50
Vancouver, British Columbia, to Seattle, Wash	9.45	Cartage to store, San Francisco, Calif	5.00
Seattle, Wash., to San Francisco, Calif	13.86	Total cost	41.26

TABLE 22.—*Clams packed in Maine: Production and shipments to the Pacific coast, 1930–31*

Drained weight per tin	Tins per case	1930		1931	
		Total pack	Shipments to Pacific coast	Total pack	Shipments to Pacific coast
		Cases	*Cases*	*Cases*	*Cases*
5 to 6 ounces	48	53,266	4,595	53,181	12,509
8 to 9 ounces	48	9,872	2,918	8,277	4,366
10 ounces	24	7,493		6,170	15
Total		70,631	7,423	67,628	16,890

49

APPENDIX II

CHANGING DUTY ON CANNED CLAMS

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas under and by virtue of section 336 of title III, part II, of the act of Congress approved June 17, 1930 (46 Stat. 590, 701), entitled "An Act To provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes", the United States Tariff Commission has investigated the differences in costs of production of; and all other facts and conditions enumerated in said section with respect to, clams, packed in air-tight containers, being wholly or in part the growth or product of the United States and of and with respect to like or similar articles wholly or in part the growth or product of the principal competing countries;

Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given reasonable opportunity to be present, to produce evidence, and to be heard;

Whereas the Commission has reported to the President the results of said investigation and its findings with respect to such differences in costs of production;

Whereas the Commisison has found it shown by said investigation that the principal competing country for razor clams (Siliqua patula), packed in air-tight containers, is Canada, and that the duty expressly fixed by statute does not equalize the difference in the costs of production of the domestic articles and the like or similar foreign articles when produced in said prin-

cipal competing country; and that the principal competing country for clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in air-tight containers, is Japan, and that said difference with respect to these articles cannot be equalized by proceeding under the provisions of subsection (a) of said section and act;

Whereas the Commission has specified in its report the decreased rate of duty on razor clams (Siliqua patula), packed in air-tight containers, and the ad valorem rate of duty based on the American selling price, as defined in section 402 (g) of said act, of the domestic articles, on clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in air-tight containers, found by the Commission to be shown by said investigation to be necessary to equalize such differences in costs of production; and

Whereas in the judgment of the President such decreased rate of duty and such ad valorem rate of duty based upon said American selling price are shown by such investigation of the Tariff Commission to be necessary to equalize such differences in costs of production;

Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, do hereby approve and proclaim a decrease in the rate of duty expressly fixed in paragraph 721 (b) of title I of said act on razor clams (Siliqua patula), packed in air-tight containers, from 35 per centum ad valorem to 23 per centum ad valorem; and assessment of the rate of 35 per centum ad valorem expressly fixed in said paragraph, title, and act on clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in air-tight containers, upon the American selling price, as defined in section 402 (g) of said act, of clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in air-tight containers, manufactured or produced in the United States.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 1st day of May, in the year of our Lord nineteen hundred and thirty-four, and of the Independence of the United States of America the one hundred and fifty-eighth.

[SEAL] FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,
Secretary of State.

[No. 2081]

51 In United States Customs Court

Reappraisement 113195–A

No. 4034

GEO. S. BUSH & CO., INC.

v.

UNITED STATES

Decision

March 11, 1937

SULLIVAN, Judge:

The merchandise in the case at bar consists of Japanese canned clams. There were two sizes, viz, 5-ounce and 8-ounce tins, each size in cases containing 48 tins. They were entered to meet advances at $4.40 per case for the 5-ounce size, and $6.40 per case for the 8-ounce tins (United States currency), less 1½ per centum. They were appraised as entered. The appraisal was made in accordance with the Presidential proclamation of May 1, 1934, T. D. 47031, which among other things changed the basis for the assessment of duty on clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in airtight containers, to the American selling price as defined in Section 402 (g) of the Tariff Act of 1930 of similar merchandise manufactured or produced in the United States.

The plaintiff contends that the proper dutiable value is the export value in the country of production (Japan), and therefore it was illegal to appraise such merchandise on the basis of the American selling price. The plaintiff concedes that the clams covered by this appeal are the type provided for in the proclamation, but contends that the proclamation is illegal and void, and therefore that the clams are dutiable at their export value.

The evidence consists of the report of the Tariff Commission (Exhibit 1), and the official samples of the merchandise (Exhibits 2 and 3).

At the trial it was conceded by the Government that if the court found the merchandise dutiable according to its
52 export value, then the export value would be that shown on the invoice, viz, $2.75 and $3.68 per case, less non-dutiable charges, or a net dutiable value of $2.5107 per case and $3.3598 per case for the 5- and 8-ounce tins respectively.

It was agreed by both parties that there is no foreign value.

It was also agreed by both sides that the appraised values are the proper American selling prices and values if the court finds the dutiable value to be the American selling price.

The single question then involved is the legality of the proclamation of the President, whereby the President proclaims assessment at the rate of 35 per centum ad valorem under paragraph 721 (b), Tariff Act of 1930,

"on clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in airtight containers, upon the American selling price, as defined in section 402 (g) of said Act, of clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in airtight containers, manufactured or produced in the United States."

As heretofore stated, the plaintiff contends that the proclamation is void and the merchandise is dutiable according to the export value on the figures heretofore stated.

The case has been ably briefed, and plaintiff's counsel has given extended reasons to support his contention that the proclamation is void, and the export value should govern.

The admission in evidence of the report of the Tariff Commission (Exhibit 1) was not for the purpose of disputing the facts as to the value of the merchandise, but to determine whether the Commission complied with the law in giving notice and in its investigation. If it did, then on the facts in this record the Presidential proclamation is valid. On the other hand, if it did not, the Presidential proclamation is invalid.

The record presents the following questions:

(1) Had the President jurisdiction to act?

(2) Was a hearing had by the Tariff Commission as provided in section 336 of the Tariff Act of 1930?

53 (3) Was a report made to the President with recommendations?

(4) Did the President act on such report?

Section 336 has reference entirely to "Equalization of Costs of Production," and "Change of Classification or Duties." In specific terms it provides:

"In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the Commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the

investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings."

Thus was established "the policy of Congress by this Act intended" to do certain things on the happening of certain events.

The statute further provides:

"If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (*including any necessary change in classification*) as it finds shown by the investigation to be necessary to equalize such differences. [Italics ours.]

It then further provides:

"(b) CHANGE TO AMERICAN SELLING PRICE.—If the commission finds upon any such investigation that such differences cannot be equalized by proceeding as hereinbefore provided, it
54 shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased."

Here is a specific declaration by Congress, which has plenary power with reference to all customs rates of duty.

What are the jurisdictional facts required to set in motion the action of the President? (1) That an investigation be had by the Tariff Commission.

The report to the President (Exhibit 4) expressly states with reference to the class of merchandise involved, and it is admitted the proclamation and report of the Commission are directed towards merchandise identical with that involved. In this report the Commission states:

"The Commission instituted this investigation on June 28, 1932, in response to an application for an increase in the duty on all canned clams and an application for a decrease in the duty on minced razor clams."

This was the inception of its proceedings.

Then the report states:

"Public notice of the hearing was given on the same date. At the public hearing, held on October 5, 1932, in Washington, D. C.,

parties interested were given reasonable opportunity to be present, to produce evidence, and to be heard, as required by law."

Thus it amply appears that the Commission complied with the statute by giving notice and holding the investigation.

With the filing of the application and giving due notice of the hearing the Tariff Commission had jurisdiction to hold the hearing and make the report to the President. With that fact established the report made to the President complied with every jurisdictional requirement necessary to put in motion its investigation.

The Commission found it shown by the investigation—

"(a) That the duty of 35 per cent ad valorem, expressly fixed by statute on clams, clam juice, or either in combination with other substances, packed in airtight containers, does not in the case of clams or of clams in combination with other substances (except clam chowder), packed in airtight containers, equalize the difference in the costs of production, including transportation and other delivery charges to the principal market in the United States, of the domestic articles and the like or similar foreign articles produced in the principal competing countries."

The Commission concludes with reference to the merchandise involved, viz, clams packed in airtight containers, etc., that—

"* * *, the rate of duty necessary to equalize such difference within the limits permitted by section 336 (b) of title III of the Tariff Act of 1930 is 35 percent ad valorem based upon the American selling price of the domestic article."

This was the report of the Commission to the President and its recommendations.

So far, in my judgment, the report is competent evidence to establish these jurisdictional facts. But it would not be competent, in my judgment, for this court to attempt to weigh the facts upon which the Commission's judgment was based. This court is not permitted to do so. Such facts are not justiciable. All that is required is to ascertain whether or not the Commission complied with the law in its proceedings. I find it has. Therefore, this report to the President was competent, and within the law as set out in section 336.

It is now contended, and forcibly, that the facts were not sufficient to justify the President in acting, and therefore the proclamation is void. That strikes at the very heart of this entire matter. It is not for this court to weigh what facts the Commission found. It was for the President to weigh such facts for the statute clearly provides:

"SECTION 336. * * * (c) PROCLAMATION BY THE PRESIDENT.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if *in his judgment* such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production." [Italics ours.]

Therefore, it follows that the weight to be given to the facts disclosed rests with the President, that he may either reject or accept such facts and the recommendations made by the Commission. He cannot, in my judgment, as was held under Section 315 of the Tariff Act of 1922, consider matters outside of the Commission's report. He is confined to the facts narrated in the report submitted to him.

If these facts are not susceptible of the finding made by the President this court cannot interfere therewith, nor say to the President, "You should not have accepted them." The law does not give this court that power. It expressly puts it within the power of the President to say whether or not the changes as shown by such investigation are necessary to equalize the cost of production. When he makes his finding it becomes a verity, not subject to any judicial review thereof.

Counsel for plaintiff in their brief do not severely antagonize this holding, but contend that the Commission committed error in arriving at the valuation it did by taking "the weighted average of the invoice prices or values," and not giving full consideration to differences in exchange values. In my judgment, these are matters that cannot be considered by this court. I must be governed entirely when the jurisdictional facts are established, by the proclamation itself, and that proclamation enumerates the conditions the Tariff Commission is required to follow before the report is made. The President finds the Commission did make an investigation; that public notice was given of a hearing at which the parties interested were given an opportunity to be present and to be heard; and the proclamation of the President, as a result of that investigation with respect to such differences in the cost of production, and referring to the merchandise involved, namely, clams packed in airtight containers, finds that the principal competing country is Japan, "and that said differences with respect to these articles cannot be equalized by proceeding under subdivision (a) of said section and act," and he concludes:

"Whereas in the judgment of the President such decreased rate of duty and such ad valorem rate of duty based upon

said American selling price are shown by such investigation of the Tariff Commission to be necessary to equalize such differences in costs of production:

"Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, do hereby approve and proclaim * * * assessment of the rate of 35 per centum ad valorem expressly fixed in said paragraph, title, and act on clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in air-tight containers, upon the American selling price, as defined in section 402 (g) of said act, of clams other than razor clams; and clams in combination with other substances (except clam chowder), packed in air-tight containers, manufactured or produced in the United States."

The attack made by counsel for the plaintiff on the report of the Tariff Commission seems to be that the Commission did not follow the law in that they accepted "the weighted average" and did not sufficiently find with reference to the values of exchange; that the Commission is required to follow an "intelligible principle" as enunciated in Hampton v. United States, 276 U. S. 394. This is not an attack on the constitutionality of the law. The "intelligible principle" referred to in the Hampton case, supra, is an enunciation by the court that if there is an "intelligible principle" enacted into law by Congress, the President then may act as the agent of Congress in carrying out its wishes.

It has been consistently held that Congress may delegate to an agent the ascertainment of facts, and that the agent may then carry out the policy of Congress (Field v. Clark, 143 U. S. 649). The latest expression I have been able to find on this point is Panama Refining Co. v. Ryan, 293 U. S. 388, where Chief Justice Hughes states:

"Accordingly we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition."

Admittedly a policy as defined in section 336. Therefore Congress did declare a policy. It did set up a standard for the President's action. It did require that facts be reported to the President in the exercise of the authority therein expressed. The court then said:

"Applying that principle, authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed have constantly been sustained. Moreover, the Congress may not only give such authorizations to determine specific facts but may establish pri-

mary standards, devolving upon others the duty to carry out the declared legislative policy; that is, as Chief Justice Marshall expressed it, 'to fill up the details' under the general provisions made by the legislature."

In Hampton v. United States, 276 U. S. 394, the court said (p. 409):

"The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority." [Italics ours.]

In my judgment this is ample to justify the issuance of the proclamation in the case at bar.

In Akawo v. United States, 23 C. C. P. A. 75, T. D. 47437, the court had under consideration section 315 of the Tariff Act of 1922. That provision was somewhat broader than section 336 of the act of 1930. It required the report of the Tariff Commission, but the President was not confined to its facts, as he is under Section 336 of the act of 1930. In the Akawo case, supra, the question was similar to that involved in the present case,
59 and passed upon the American selling price as defined in Section 402 (f) of the act of 1922. In fact the very question now before us was involved in the Akawo case; that is, that the valuation upon the basis of the American selling price was illegal and void.

The court found in the Akawo case, supra, that the Tariff Commission, as a condition precedent to a lawful proclamation by the President, had held an investigation; that public notice of such investigation was given and that interested parties appeared at the hearings and presented briefs relative to the subject-matter of the investigation, as appeared from the report. In the case at bar it is not contended that notice was not given, nor that investigations were not held. The presumption arising from the investigation is that notice was given. The report is competent evidence with reference to that fact.

In the Akawo case, supra, the court in closing its opinion stated:

"It appears from the record that the President complied with the mandates of section 315, supra. Accordingly his findings of fact are final and conclusive, and may not be reviewed by the courts." United States v. S. Leon & Co., 20 C. C. P. A. (Customs) 49, T. D. 45677, and cases cited therein.

Without answering every question presented by plaintiff's counsel in their brief, we can state that the same facts are estab- in the case at bar, and I find:

(1) That there was a petition filed with the Tariff Commission with reference to an increase in rates.

(2) That in accordance therewith an investigation was ordered.

(3) That public notice was given, and interested parties appeared in response thereto, and offered testimony.

(4) That a report thereon was made to the President of the United States, showing there was a difference in the cost of production of domestic articles and similar foreign articles produced in Japan, and that to equalize such costs it was necessary to base the duty upon the American selling price of the domestic article, as defined in Section 402 (g) of the Tariff Act of 1930.

60 (5) That the proclamation of the President was legal, and that the ascertainment of the value of the merchandise in question according to the American selling price, as defined in said Section 402 (g), was legal.

Judgment will therefore be rendered for the defendant afirming the appraised value.

SULLIVAN, J.

In United States Customs Court

Seattle, Wash.

Reappraisement No. 113195–A. Collector's No. 2553. Entry No. 4670

GEO. S. BUSH & CO., INC., PLAINTIFF

vs.

UNITED STATES, DEFENDANT

Judgment

This Case having come on for trial before Judge Sullivan sitting in reappraisement, and the case having been heard and

submitted for decision, and the Court, after due deliberation, having rendered a decision herein in favor of the defendant and against the plaintiff, now in conformity with said decision,

It is Hereby Ordered, Adjudged, and Decreed that the dutiable values of the involved merchandise, on the date of exportation thereof, are the appraised values.

JERRY B. SULLIVAN,
Judge, U. S. Customs Court.

Dated at New York, N. Y., this the 11th day of March, 1937.

61 In United States Customs Court

Reap. 113195-A/2553

[Title omitted.]

Application for review

Filed May 18, 1937

Application is hereby made for a review of the decision and judgment rendered by Judge Sullivan, March 11, 1937, in Seattle reappraisement 113195-A/2553, entry number 4670, of April 6, 1936, relating to canned clams appraised at the American selling price under section 402 (g), tariff act of 1930.

San Francisco, March 29, 1937.

GEO. S. BUSH & CO., INC.,
Appellant,
By LAWRENCE & TUTTLE,
Attorneys for Appellant,
G. R. T.,
500 Sansome Street,
San Francisco, California.

To Collector of Customs, Seattle, Washington, —— ——, Assistant Attorney General, 201 Varick Street, New York City.

[File endorsement omitted.]

United States Customs. Received Mar. 31, 1937, Seattle, Wash.

62 [Clerk's certificate to record omitted in printing.]

63 In United States Customs Court

Second Division, Appellate Term

Reappraisement 113195-A. No. 4253

GEO. S. BUSH & CO., INC.

v.

UNITED STATES

Application for Review of Decision of Sullivan, Judge (Reap. Dec. 4034)

Decision

March 9, 1938

DALLINGER, Judge:

This is an application for a review of the decision (Reap. Dec. 4034) rendered by Judge Sullivan on March 11, 1937, wherein he found the dutiable value of certain clams in tins imported from Japan and entered at the port of Seattle to be the value found by the appraiser.

The merchandise was entered under duress at $4.40 per case for the 5-ounce size and $6.40 per case for the 8-ounce size (United States currency), less 1½ per centum, and it was appraised as entered. The appraisement was made in accordance with the Presidential proclamation, dated May 1, 1934, and promulgated in T. D. 47031, which changed the basis of appraisement of clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in airtight containers, from the export value thereof to the American selling price of similar merchandise produced in the United States, as such selling price is defined in Section 402 (g) of the Tariff Act of 1930.

Before the trial judge the plaintiff contended that the proper dutiable value of said merchandise was the export value thereof in Japan, the country of exportation, and that it was therefore illegal to appraise it on the basis of the American selling price. The plaintiff concedes that the involved clams are of the kind

64 covered by said Presidential proclamation, but insists that such proclamation is null and void, and that consequently these clams are dutiable based upon their export value.

Before the trial court the only evidence introduced consisted of the report, dated April 5, 1934, made to the President by the United States Tariff Commission, which report is No. 84, second series, and a copy thereof is in evidence herein as Exhibit 1.

Also in evidence as Exhibits 2 and 3 are official samples of the imported merchandise.

At such hearing it was conceded by the Government that if the court found the merchandise to be dutiable on the basis of the export value thereof, such value would be that shown on the invoice, namely: $2.75 and $3.68 per case, respectively, less nondutiable charges, or a net dutiable value of $2.5107 and $3.3598 per case for the 5- and 8-ounce tins, respectively. It was agreed by both parties that there was no foreign value for said merchandise.

It was also agreed by both sides that the appraised values are the correct American selling prices, in case the court found such prices to be the dutiable value of the merchandise.

The only issue before the trial judge and before us is the legality of the Presidential proclamation of May 1, 1934 (T. D. 47031).

Section 336 of the Tariff Act of 1930 provides as follows:

"SEC. 336. EQUALIZATION OF COSTS OF PRODUCTION.

"(a) CHANGE OF CLASSIFICATION OR DUTIES.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission
65 shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease

of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

"(b) CHANGE TO AMERICAN SELLING PRICE.—If the commission finds upon any such investigation that such differences cannot be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rates shall be increased.

"(c) PROCLAMATION BY THE PRESIDENT.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

* * * * * * *

"(e) ASCERTAINMENT OF DIFFERENCES IN COSTS OF PRODUCTION.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, insofar as it finds it practicable:

* * * * * * *

66 "(2) IN THE CASE OF A FOREIGN ARTICLE.—(A) The cost of production, as hereinafter in this section defined, or, *if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental hereto, the weighted average of the invoice prices or values for a representative period and/or the average wholesale selling price for a representative period.*". [Italics ours.]

Upon this record the trial judge made the following findings:

1. That there was a petition filed with the Tariff Commission with reference to an increase in rates.

2. That in accordance therewith an investigation was ordered.

3. That public notice was given, and interested parties appeared in response thereto, and offered testimony.

4. That a report thereon was made to the President of the United States, showing there was a difference in the cost of production of domestic articles and similar foreign articles produced in Japan, and that to equalize such costs it was necessary to base the duty upon the American selling price of the domestic articles, as defined in Section 402 (g) of the Tariff Act of 1930.

5. That the proclamation of the President was legal, and that the ascertainment of the value of the merchandise in question

according to the American selling price, as defined in Section 402 (g), was legal.

At the hearing on the application for review held before this division on November 3, 1937, counsel for the appellant in his argument thus limited the issue involved herein:

Mr. TUTTLE:

* * * * * * * * *

* * * The Tariff Commission, after certain steps that had to be taken, investigated the differences in the costs of production of clams produced in the United States and clams produced in other countries. Their report is here in evidence. There is only one portion of it with which we are now concerned, that is, clams from Japan.

67 As to that merchandise, the Tariff Commission took what they found to be a representative period of time. We have no quarrel with that. They took from the month of December 1930, all of 1931, and from January until the 30th of September 1932, a period of 22 months, which they state is representative of the costs of production of both the foreign and the domestic article.

The section under which they act, section 336, directs them to investigate the differences in the cost of production, and to report those differences to the President together with their recommendations as to what changes should be made, if any. The section also allows the commission, in the event they cannot ascertain the actual cost of production, to accept, as the law says, the weighted average invoice values, and it was under that portion of the law that they found a value representing the cost of production of the Japanese article.

The period of time they took, as I said, ran from December of 1930 to September 1932. The commission instead of finding the actual cost of production took all invoices covering importations at the Port of San Francisco, which they found was the principal point of importation, and the invoices, of course, were expressed in foreign currency, in yen.

The complaint arises by virtue of the fact that the commission also determined the rates of exchange for those 22 months, during which time it ranged from 49 cents down to around 28 cents or lower, and instead of converting the yen into dollars at the rate of exchange in effect at the time of each exportation they arbitrarily stated in their report that in their opinion—I will read it, if I may; it will be more accurate:

For this reason the invoice prices of the Japanese products imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or prob-

able future invoice values in terms of dollars. The Commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932.

It is that single act that we complain of.

* * * * * * *

68 It was by virtue, and solely by virtue, of that arbitrary method of converting the foreign currency into dollars that the commission was able to arrive at the conclusion that the differences in cost of production required the merchandise to be appraised upon the American selling price.

Counsel then proceeded to argue that the Tariff Commission exceeded its powers in taking the average rate of exchange for the entire year of 1932, whereas the invoices for only nine months of that year were examined.

In appellant's brief filed herein it is contended that if the prevailing rate of exchange at the time of each shipment had been taken instead of the average rate of exchange for the year 1932, it would not have been necessary to equalize the differences in the costs of production by an increase in duty. It is also pointed out that in a similar investigation relating to canned tuna fish the Tariff Commission in its report to the President on August 10, 1933 (Report No. 71, Second Series), used the prevailing rates of exchange on the dates of exportation, as herein contended, rather than a lower average rate as in the present case.

In appellant's brief occurs the following:

In the present case the rate of exchange used was .2811, the average for the year 1932; yet the values converted at this rate were values of merchandise exported in December 1930, during all of 1931, and from January to September 30, 1932. In other words, the rate used was not even the average of the rates in effect during the time the merchandise under consideration was exported! It was purely arbitrary and speculative, and the dollar values thus obtained, which were used as a comparison with domestic costs, bore absolutely no relationship to the real foreign values. In view of this, can it be said that the President has conformed to the "intelligible principle" laid down by Congress? Certainly not; and therefore his action was ultra vires under Foster v. U. S., 20 C. C. P. A. 15, 22, T. D. 45673, in which it was held that he "was obliged to keep within the law under which he acted; otherwise his acts became ultra vires and of no effect."

If, under the definition of "weighted average" the Presi-
69 dent is entitled to use whatever rate of exchange he chooses, then, as stated in the Foster case, supra (p. 22):

"The Statute became a dead letter, and the President may, at his choice, dispense with the essential element in the intelligible principle of rate fixing.

"If this is what Congress intended when it provided that the weighted average of the invoice prices or values might be taken as evidence of the cost of production, then without doubt the statute is an unconstitutional delegation of legislative authority."

Counsel for the Government in his brief filed herein makes three contentions:

1. That the decision and judgment of the court below should be affirmed without consideration of the merits of the case because of the importer's failure to comply with the provisions of rule 38 of the rules of this court.

2. That this court has no power to review the action of the Tariff Commission in converting the weighted average invoice value of the involved merchandise by an average rate of exchange.

3. That every act of the Tariff Commission in conducting the investigation was in strict conformity with the statute.

In regard to the first contention we are of the opinion that there has been no noncompliance with rule 38 which would justify us in refusing to consider this case on its merits.

The pertinent portions of said rule read as follows:

"38. ASSIGNMENT OF ERRORS. The appellant or his attorney in proceedings for review in reappraisement cases, when relying upon errors of law made by the court below in its rulings upon the inclusion or exclusion of evidence, shall, not less than three days prior to the date on which the case is set for argument, file with the clerk of the court, and serve upon the opposing party or his attorney, a brief statement in writing setting forth in concise form any evidence admitted or excluded as to which he considers the lower court to have committed error in its rulings thereon, pointing out specifically the rulings to which he takes exception.

"If the appellant or his attorney in proceedings for review
70 in reappraisement cases relies upon errors of fact or law, other than those set forth in the paragraph next above, the application for review shall be considered as setting forth any such errors *without the filing of further assignments.*" [Italics ours.]

It being conceded that there were in this case no rulings relating to the inclusion or exclusion of evidence which were required to be set out, the second clause of said rule was the only one applicable to the instant case. The sole object of such second

clause was to obviate the necessity on the part of the appellant of setting forth in detail the errors of fact or law of which he complained, other than those mentioned in the first clause of said rule. The application for review itself, in our opinion, was amply sufficient to cover the alleged error or errors on the part of the trial judge of which the appellant complains.

But with the second and third contentions of counsel for the Government we are in accord.

The question of the power of the courts relative to Presidential proclamations and of investigations by the United States Tariff Commission upon which said proclamations are based, has repeatedly been before this court and the Court of Customs and Patent Appeals.

The only case in which a Presidential proclamation has been declared invalid on the ground that the Tariff Commission failed to comply with the requirements of the statute is that of Carl Zeiss, Inc., v. United States, 23 C. C. P. A. 7, T. D. 47654. The sole ground for the court's decision in that case was that the Tariff Commission had not complied with the provisions of Section 336 of the Tariff Act of 1930 in the giving of a reasonable public notice to all interested parties. In every other case the courts have uniformly upheld the validity of such proclamations.

In the case of Union Fork & Hoe Co. v. United States, T. D. 47478, 67 Treas. Dec. 82, the plaintiff contended that a Presidential proclamation reducing the duty on certain hay and manure forks was illegal and void for three reasons:

1. That the foreign cost of production of said merchandise was not obtained by the United States Tariff Commission from the German manufacturer who exported the articles in controversy to the United States.

71 2. That said Commission failed to obtain the weighted average of the invoice prices or values for a representative period.

3. That said commission found the cost of production of wholly different kinds of forks from those manufactured in the United States.

After therein pointing out the inapplicability of the decision in Feltex Corporation (United States impleaded) v. Dutchess Hat Works, an American manufacturer, 21 C. C. P. A. 463, T. D. 46957, we said (in Union Fork & Hoe Co. v. United States, supra):

"We must confess that we find nothing in the above quotations which would tend to sustain the contention of the plaintiff. Much more pertinent, in our opinion, is the following excerpt from said decision (p. 476):

"It will be observed that the commission is required only to report to the President 'the results of the investigation,' and 'its

findings,' and shall specify in its report such increases or decreases in rates of duty, including any changes in classification, as it finds shown by the investigation to be necessary to equalize differences in costs of production. *It is not required to include in its report the evidence taken, nor is it required to include in its report any statement of the evidence or facts before the commission, secured in its investigation.* [Italics ours.]

"Nor do we consider as here pertinent the decision of the appellate court in William A. Foster & Co., Inc., et al. v. United States, 20 C. C. P. A. 15, T. D. 45673, from which counsel for the plaintiff quote as follows:

"Nor does what we have said amount to a holding that any sort of an investigation by the Tariff Commission, however irrelevant, will justify a following proclamation by the President under this section. An investigation of cotton goods, for example, would not be a sufficient prerequisite for a change in duties in the woolen schedule. The investigation must be upon the subject matter involved.

"In the instant case the subject under investigation by
72 the Commission was hay and manure fork heads which admittedly constitute the class of articles here imported.

"The first alleged illegality of the Commission is that the foreign cost of production was not obtained from the German manufacturer and exporter of the merchandise at bar. The fact is referred to in the report of the Commission, and the reason given for not obtaining the information from that source is that such costs could not be secured owing to the incomplete state of the records of said manufacturer.

"We can find nothing in the law which limits the Tariff Commission to that source of inquiry.

"As to the second charge of illegality, to wit, that the Commission failed to comply with the requirements of said section 336 (e), counsel for the plaintiff seem to have ignored the opening sentence of that particular part of the law. Such initial sentence reads:

"'(e) ASCERTAINMENT OF DIFFERENCES IN COST OF PRODUCTION.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, *insofar as it finds practicable:* * * *' [Italics ours.]

"We are convinced that it is not within the province of this court to inquire into the reasons which the Commission may regard as rendering the ascertainment and consideration of certain information impracticable.

"The third alleged illegality charged is that the Commission found the cost of production of wholly different kinds of fork

heads than those made in this country. But the Commission, in its report, states that it had obtained costs from a firm in Germany 'producing all types of forks.' It is not within the province of this court to review the evidence upon which the Tariff Commission may have based its conclusion of similarity of merchandise."

In the instant case the Tariff Commission said (p. 4 of Exhibit 1):

"6. The years 1931 and 1932 are representative with respect to the domestic cost of production of canned clams and the
73 invoice prices of Japanese canned clams, in terms of Japanese currency. During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or probable future invoice values in terms of dollars. The Commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932. Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932."

In the present case the articles under investigation by the Tariff Commission consist of clams which admittedly are the kind of articles here imported. Moreover, it is not here within the province of this court to question the reasons advanced by the Tariff Commission for converting the invoiced prices in yen to dollars at the average rate of exchange for the year 1932. There certainly is nothing in the statute which prohibits such a method of conversion, and accordingly that matter is left to the discretion of the commission.

Finally, it is not within the province of this court to review the facts upon which the commission based its recommendation to the President for increase in rate of duty necessary to equalize the difference in the cost of production of Japanese clams as compared with similar domestic merchandise.

In affirming our decision in the case of Union Fork & Hoe Co. v. United States, supra, the appellate court in Union Fork & Hoe Co. v. United States (International Hoe & Fork Co., party in interest), 24 C. C. P. A. 199, T. D. 48656, said:

"An investigation is a prerequisite to the issuance of a proclamation by the President. William A. Foster & Co. v. United States, 20 C. C. P. A. (Customs) 15, T. D. 45673. However, when it is once established that such an investigation has been

had, it is not within the power of this court to go behind
74 the report and findings of the commission and to determine whether, in fact, the proceedings of the commission, and the evidence heard before it, was sufficient to justify the findings and conclusions arrived at.

"We do not sit as a court to review the record made before the Tariff Commission. 'When a judicial review was thought necessary the Congress provided for it, as in section 316 of the Tariff Act of 1922. Not having provided directly for such a review, it was certainly not the intent of the lawmakers that we should so review such hearings collaterally and indirectly.' Foster & Co., supra, citing Norwegian Nitrogen Products Co. v. United States, 20 C. C. P. A. (Customs) 27, T. D. 45674, and United States v. Fox River Butter Co., 20 C. C. P. A. (Customs) 38, T. D. 45675.

* * * * * * *

"The weight of this report was a matter for the consideration of the President. We have neither the inclination nor the right to review the same for the purpose of ascertaining whether the findings of the commission were correct. It is sufficient for us to say that it does appear affirmatively, from the report of said commission and its findings, that an investigation was made of the differences in cost of production of the articles of the class or type of the imported articles and like or similar domestic articles, and that a public hearing was had and an ample opportunity afforded the appellant to be present and to be heard at such hearing.

"Much reliance has been placed by counsel for appellant upon our recent case of Carl Zeiss, Inc. v. United States, 23 C. C. P. A. (Customs) 7, T. D. 47654. In that case we held a proclamation issued by the President under said section 336 to be invalid, because of a failure of the commission to give proper notice to parties interested of the subject matter of the investigation upon which the proclamation was based. Clearly, in that case, the parties interested had no notice of an inquiry which was made by the commission on its own volition, and as a result of which additional rates of duty were imposed upon certain imported products. But no such complaint is made here. The appellant
75 does not deny the receipt by it of proper notice. Its only complaint is that the investigation did not go far enough to show properly the differences of cost of production between the imported product and like or similar domestic products.

* * * * * * *

"Finally, it is contended that the commission did not obtain an 'average foreign wholesale selling price for a representative

period of like or similar competitive imported articles.' As we view it, this also raises a question as to the weight, not the legality, of the investigation of the commission. In such cases, the rule is as stated in our decision in William A. Foster & Co. (Inc.) et al. v. United States, supra, where we said:

"'It is also argued that some members of the commission computed their differences by reference to years not proper measures of such differences. These are all matters which affect the weight, not the legality, of the investigation by the commission.'"

After a careful consideration of the arguments of counsel and of the applicable decisions of the courts, we hold that the Tariff Commission in the instant case acted within its legal authority under section 336 of the Tariff Act of 1930; that its report to the President was in accordance with law; that the ascertainment of the value of the merchandise in question based upon the American selling price of similar domestic merchandise, as defined in Section 402 (g) of said tariff act, was in accordance with law, as was also the Presidential proclamation set forth in T. D. 47031.

We therefore find the proper dutiable value of the involved merchandise to be the appraised value thereof, and hold that the decision and judgment of the trial judge should be and the same hereby are affirmed. Judgment will be rendered accordingly.

FRED'K W. DALLINGER, *J.*

Concurring:
W. J. T., *J.*
D. H. K., *J.*

76 In United States Customs Court, Second Division

Seattle, Wash.

Reappraisement No. 113195–A. Collector's No. 2553. Entry No. 4670

GEO. S. BUSH & CO., INC., APPELLANT

vs.

UNITED STATES, APPELLEE

Judgment

This Case having duly come on for trial before the Second Division of the United States Customs Court, and having been heard and submitted for decision, and the Court, after due

deliberation, having rendered a decision herein, now in conformity with said decision,

It is Hereby, Ordered, Adjudged, and Decreed that the decision of the Court below be and the same is hereby affirmed.

WILLIAM J. TILSON,
D. H. KINCHELOE,
FRED'K W. DALLINGER,
Judges of the United States Customs Court.

Dated at New York, N. Y., this the 9th day of March 1938.

[File endorsement omitted.]

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Thursday, February 9, 1939

At a session of said court continued and held at the city of Washgton, pursuant to adjournment, on this 9th day of February, A. D. 39.

Present the Honorable FINIS J. GARRETT, Presiding Judge, and the onorables OSCAR E. BLAND, CHARLES S. HATFIELD, IRVINE L. LENOT, and JOSEPH R. JACKSON, Associate Judges.

The court was opened for business in due form.

* * * * * * *

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

Customs Appeal No. 4173

Said appeal came on to be heard before the court and after hearg the arguments of counsel the cause was taken under advisement the court.

* * * * * * *

United States Court of Customs and Patent Appeals

* * * * * * *

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

October Term, 1938. Customs Appeal No. 4173. Customs Calendar No. 30

HATFIELD, Judge. This is an appeal from a judgment of the ited States Customs Court, Second Division, in reappraisement . 113,195–A.

Merchandise, consisting of canned clams, imported into the United ates from Japan and entered at the port of Seattle, Washington, s appraised by the local appraiser at that port upon the basis of American selling price as defined in section 402 (g) of the Tariff t of 1930, pursuant to a proclamation by the President of the ited States, dated May 1, 1934, T. D. 47031, 65 Treas. Dec. 736, ued under the flexible tariff provisions—section 336—of the tariff t of 1930.

Section 336, supra, so far as material to the issues here involved, reads:

"SEC. 336. EQUALIZATION OF COSTS OF PRODUCTION.

"(a) Change of Classification or Duties.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

"(b) Change to American Selling Price.—If the commission finds upon any such investigation that such differences cannot be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

"(c) Proclamation by the President.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

* * * * * * * * *

"(e) Ascertainment of Differences in Costs of Production.—In ascertaining under this section the differences in costs of production,

the commission shall take into consideration, in so far as it finds it practicable:

"'(1) In the Case of a Domestic Article.—(A) The cost of production as hereinafter in this section defined; (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

"'(2) In the Case of a Foreign Article.—(A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for a representative period and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets); (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

* * * * * * *

"(h) DEFINITIONS.—For the purpose of this section—

* * * * * * *

"'(4) The term "cost of production," when applied with respect to either a domestic article or a foreign article, includes for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in the production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.'"

Section 402 of the Tariff Act of 1930, so far as pertinent, reads:

"SEC. 402. VALUE.

* * * * * * *

"(d) Export Value.—The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar

merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * * * * * *

"(g) American Selling Price.—The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade, and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article."

The importer appealed for reappraisement, claiming that the involved merchandise, which it is conceded is dutiable under paragraph 721 (b) of the Tariff Act of 1930 at 35 per centum ad valorem, should have been appraised at its foreign or export values, whichever are higher, rather than upon the basis of the American selling price, as defined in section 402 (g), supra.

On the trial before the trial court it was stipulated by counsel for the parties that the merchandise has no foreign values; that its export values are $2.75 per case for that imported in five-ounce tins, and $3.68 per case for that imported in 8-ounce tins, less nondutiable charges as shown by the invoice; that should the export values be held to be the proper dutiable values of the merchandise the dutiable values are $2.5107 per case for the 5-ounce tins, and $3.598 per case for the 8-ounce tins; and that should the presidential proclamation be held valid, the appraised values are the proper dutiable values of the merchandise.

Counsel for the importer introduced in evidence the presidential proclamation and the report of the Tariff Commission.

The trial court affirmed the appraised values, and, on appeal, the appellate division of the Customs Court affirmed the judgment of the trial court.

Counsel for appellant contend that the proclamation by the President is invalid because it was based upon an investigation by the Tariff Commission which was not made in accordance with the provisions of section 336, supra; that the Tariff Commission being unable to find the cost of production of the involved merchandise, as defined in section 336 (h) (4), accepted as evidence of such cost the weighted average of invoice prices of merchandise like that here

involved in Japanese yen for the period from December 1, 1930, to September 30, 1932, and converted the Japanese yen into United States currency at the average rate of exchange for the year 1932, contrary to the provisions of section 336 (e) (2), supra; that, in so doing, the commission failed to follow the plain mandates of the statute, and, as a result, found it necessary to raise the duties on the imported merchandise out of all proportion to the difference in the cost of production of such merchandise and a like domestic product; and that "if the procedure followed by the commission and the President is not in violation of the terms of section 336, then the statute is an unconstitutional delegation of legislative power in that it grants to the agent discretion as to what the law shall be." The validity of the presidential proclamation is also challenged by counsel for appellant for other reasons, which, due to the views we hold, need not be stated here.

In its report in the instant case, the Tariff Commission stated that the cost of production of the foreign article, as defined in section 336 (h) (4), supra, was not readily ascertainable, and that, in accordance with section 336 (e) (2) (A), it "*accepted as evidence thereof the weighted average invoice prices of imports from that country.*" [Italics ours.]

It will be observed that section 336 (e) (2) (A) expressly authorizes the commission to accept as evidence of the cost of production of a foreign article "the weighted average of the invoice prices or values for a representative period," in the event the cost of production, as defined in paragraph (h) (4), supra, cannot be readily ascertained.

In its report, the commission stated that—

"*The years 1931 and 1932 are representative* with respect to the domestic cost of production of canned clams *and the invoice prices of Japanese canned clams, in terms of Japanese currency.* During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or probable future invoice values in terms of dollars. *The Commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932.* Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932." [Italics ours.]

and that—

"(C) *No other relevant factors constituting an advantage or disadvantage in competition were disclosed during the course of the investigation.*" [Italics ours.]

The question presented, therefore, is whether the Tariff Commission had any statutory authority to take the period from De-

cember 1, 1930, to September 30, 1932 (which it did in the instant case), as a representative period with respect to the invoice prices or values in Japanese currency, and, because the "exchange rate of the Japanese yen for the dollar" was much below par in 1932, use the average rate of exchange during the year 1932 for the purpose of ascertaining the weighted average of invoice prices in United States currency for the period from December 1, 1930, to September 30, 1932.

In providing in section 336 (e) (2) (A) that the Tariff Commission might accept as evidence of the cost of production of a foreign article the "weighted average of the invoice prices or values for a representative period," the Congress must have had in mind the conversion of foreign currency into United States currency. It certainly knew that finding the weighted average of the invoice prices or values for a *representative period* in foreign currency would afford the Tariff Commission no information whatsoever as to the cost of production of a foreign article.

We are of opinion that the statutory provision should be construed as though it read—the commission may accept as evidence of the cost of production of a foreign article the weighted average of the invoice prices or values *in United States currency for a representative period.*

In the case of Feltex Corp. v. Dutchess Hat Works, 21 C. C. P. A. (Customs) 463, 478, T. D. 46957, this court considered the language "the weighted average of the invoice prices or values for a representative period," contained in section 336 (e) (2) (A), supra, and said, interalia:

"It is clear that Congress, in using the term 'representative period,' had in mind that conditions upon a given day or during a given month might not fairly reflect the prices at which the merchandise was imported into the United States, *but in order fairly to determine invoice prices as evidence of costs of production, they should be considered over a representative period, and their weighted average over such period might be accepted.*" [Italics supplied.]

It was also stated in that decision that—

"The statute expressly requires the commission, in certain circumstances, to select a representative period for the ascertainment of certain facts. This the commission declares it has done. Moreover, there is no evidence in the record that it was not in fact a representative period for the ascertainment of the weighted average of invoice prices as required by the statute."

What the commission did in the instant case was to find the weighted average of the invoice prices or values in Japanese currency for an alleged representative period—December 1, 1930, to September 30, 1932—and then convert the Japanese currency into United States currency at the average rate of exchange for another period—the year 1932. Obviously, the commission did not find the weighted average of the invoice prices or values for a representative period. On the contrary, it found a weighted average by using two

eparate periods, neither of which was representative. The formula sed by the commission was not that prescribed by the Congress, t one which the commission evidently thought was better adapted the exigencies of this particular case.

If the commission has authority to modify the formula prescribed the Congress for finding the weighted average of the invoice rices or values, it has equal authority to change the statutory defiion of the term "cost of production," provided in section 336) (1), supra. Furthermore, if the commission had authority to what it did in the instant case, that is, apply the average rate exchange for the year 1932 for the conversion of Japanese curncy into United States currency, during which period the exchange te was "much below par," and thereby find that the cost of proiction of the foreign article was far less than the cost of production the domestic article, it, of course, had equal authority to apply average rate of exchange for the year 1931, during which period ch rate was "not much below par," and, as a consequence, have und a much higher cost of production for the foreign product, or e commission might have followed the formula provided by the ngress and found the weighted average of the invoice prices or lues of the foreign product in United States currency for a repreitative period by converting Japanese currency into United States rrency at the proper rates of exchange for the period from Decem- 1, 1930, to September 30, 1932, and found a cost of production of e foreign article greater than that found by the commission and s than that which the commission would have found had it applied average rate of exchange for the year 1931.

By following its own formula, the commission found it impossible equalize the difference in costs of production of the foreign and mestic articles by raising the 35 per centum ad valorem rate of ty provided in paragraph 721 (b), supra, 50 per centum, the maxim increase provided in section 336 (a), supra, and, accordingly, und it necessary to apply the 35 per centum ad valorem rate of ty "based upon the American selling price (as defined in section 2 (g)) of the domestic article," in accordance with the provisions section 336 (b), supra. Had the commission followed the second mula hereinbefore stated, the difference in cost of production of foreign article and the domestic article would have been much s, and consequently the customs duties necessary to equalize such ferences would have been much less. Or had the commission lowed the formula prescribed by the Congress, the difference in t of production of the foreign and domestic articles would have n less than that found by the commission and greater than that ich it might have found had it followed the second formula, and sequently the customs duties necessary to equalize such difference cost of production would have been less than that found by the mission in the instant case, and greater than that which the mission would have found had it followed the second formula.

It is clear, therefore, that if the commission has authority to do what it did in the instant case, it has authority to find on the same facts at least three entirely different costs of production for the foreign article, and, instead of recommending to the President a rate of duty based upon findings of fact, could recommend a rate of duty in accordance with its own economic theories. Such authority necessarily involves a discretion as to whether tariff duties shall be high or low, or whether they shall be high in certain instances and low in others—a discretion, legislative in character, which the Congress has no power to delegate. Hampton & Co. v. United States, 276 U. S. 394, and cases therein cited. Obviously, the Congress did not intend to delegate any such power to either the Tariff Commission or the President.

The Congress has given the Tariff Commission wide latitude so that the difference in cost of production of a domestic and a like or similar foreign article might be properly ascertained. In so doing, however, the Congress has prescribed certain limitations and laid down certain definitions, which the Tariff Commission has no right to ignore. Hampton & Co. v. United States, supra.

It is urged upon us, in the instant case, that, as the commission is not limited in ascertaining the cost of production of a foreign article to the weighted average of invoice prices or values but may, as it did in the instant case, take into consideration transportation costs and other costs incident to delivery of the foreign article to the principal market of the United States, as provided in section 336 (e) (2) (B), supra, and also "other relevant factors that constitute an advantage or disadvantage in competition," as provided in section 336 (e) (2) (C), supra, it had the right to take into consideration, in finding the "weighted average of the invoice prices or values for a representative period," the comparative values of the foreign and United States currencies, and apply the rate of exchange for one period to the weighted average in a foreign currency of the invoice prices or values for another period.

The answer to that contention is that the statute does not so provide.

Whether the Congress intended that the language "other relevant factors that constitute an advantage or disadvantage in competition," contained in section 336 (e) (2) (C), supra, should include matters pertaining to the conversion of foreign currency into United States currency is a question which need not concern us here. The Congress certainly did not intend that, in finding the "weighted average of the invoice prices or values" of a foreign article "for a representative period," the commission should take into consideration "other relevant factors that constitute an advantage or disadvantage in competition." It is obvious that the Congress intended that such relevant factors, if any, should be considered by the commission independently of, or supplementary to, the weighted average of invoice prices or values of a foreign article for a representative period.

A legal investigation by the Tariff Commission is a condition precedent to the issuance of a lawful proclamation by the President. Hampton & Co. v. United States, supra; William A. Foster & Co. (Inc.) et al. v. United States, 20 C. C. P. A. (Customs) 15, T. D. 45673; Norwegian Nitrogen Products Co. v. United States, 20 C. C. P. A. (Customs) 27, T. D. 45674; United States v. Fox River Butter Co., 20 C. C. P. A. (Customs) 38, T. D. 45675. That the investigation of the costs of production in accordance with the provisions of section 336 (e) (1) and (2) and (b) (4) is necessarily involved in, and, therefore, a part of, the Tariff Commission's investigation of the difference in the cost of production of a domestic article and a like or similar foreign article, is so clear as to require no discussion, for, obviously, unless the Tariff Commission first investigates the cost of production of each of the competing articles, it cannot ascertain the difference in the costs of production of such articles. The report of the Tariff Commission to the President is competent evidence to establish whether the commission's investigations and findings were made in conformity with the statutory requirements. Norwegian Nitrogen Products Co. v. United States, supra; United States v. S. Lowe & Co., 20 C. C. P. A. (Customs) 49, T. D. 45677; Carl Zeiss, Inc. v. United States, 23 C. C. P. A. (Customs) 7, T. D. 47654.

It clearly appears from the commission's report that its investigation of the cost of production of the foreign article and its findings with respect thereto were based upon an erroneous conception of the statutory provision relative to the weighted average of the invoice prices and values of the foreign article for a representative period, and that, had the commission ascertained the weighted average of such invoice prices or values in accordance with the statutory provision, its findings both with respect to the cost of production of the foreign article and the rate of duty necessary to equalize the difference in cost of production of that article and the domestic article would have been substantially different.

In the case of Feltex Corp. v. Dutchess Hat Works, supra, we held that the President was not bound by the "results" or "findings" reported by the Tariff Commission in determining whether the rates specified in the report of the commission are shown by the Tariff Commission's investigation to be necessary to equalize the difference in cost of production of foreign and domestic products, and that if "the President, upon an examination of all the facts before the commission, had any legal basis for the finding" that the rates specified in the report of the commission "were necessary to equalize the costs of production, his proclamation is valid."

In the Feltex Corp. case, supra, it appeared that the Tariff Commission had made a legal investigation, and the principles announced in our decision in that case were intended to apply only in the event such an investigation has been made. In the instant case, however, a legal investigation by the Tariff Commission—a condition precedent to the issuance of a lawful proclamation by the President—has not

been made. Accordingly, the principles announced in the Feltex case, supra, have no application to the issues in the case at bar.

We must hold, therefore, that as the investigation made by the Tariff Commission was illegal for the reasons hereinbefore stated, the proclamation by the President, based upon such investigation, was without authority of law, illegal, and void; that the appraisement and reappraisement of the involved merchandise, made on the basis of the American selling price in accordance with such proclamation, were, therefore, illegal and void; that the export values are the dutiable values of the merchandise; that, in accordance with the stipulation entered into by the parties, the dutiable values of the merchandise are $2.517 per case for that imported in 5 ounce tins, and $3.598 per case for that imported in 8 ounce tins; and that the appellate division of the United States Customs Court erred in affirming the judgment of the trial court.

Accordingly, the judgment is reversed and the cause remanded for proceedings consistent with the views herein expressed.

Reversed and remanded.

United States Court of Customs and Patent Appeals

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

October Term, 1938; Customs Calendar No. 30; Customs Appeal No. 4173

LENROOT, Judge, dissenting: I am unable to concur in the conclusion reached by the majority herein.

Of course the involved proclamation of the President is presumptively valid.

The majority opinion does not hold that there were not facts before the commission upon which costs of production could be ascertained. The evidence before the commission is not before us, and the conclusion of the majority is based wholly upon the report of the commission to the President.

The majority holds that, although the commission investigated prices or values of the foreign article for a representative period, the conversion of these prices from yen into dollars at the average rate of exchange for the year 1932 for the entire representative period was erroneous, that such error rendered the investigation made by the commission illegal, and that the proclamation of the President, having been based upon an illegal investigation, was without authority of law and void.

For the purpose of this dissent I will assume that the commission erred in its conversion of Japanese yen into dollars, at the average rate of exchange for 1932, applied to invoices of 1931. I contend, however,

that this error did not render the investigation illegal, nor should it be assumed that the President made the same error in approving the rate recommended by the Tariff Commission. It is my judgment that if there was any substantial evidence before the commission to sustain the proclamation of the President, it was valid notwithstanding any error made by the commission in drawing its conclusions from the facts secured by it in its investigation. David L. Moss Co., Inc. v. United States, 26 C. C. P. A. (Customs) —, C. A. D. 45, 103 F. (2d) 395. Inasmuch as the evidence produced before the commission is not before us, we must presume that there was such substantial evidence unless from the facts reported by the commission we may not indulge the legal presumption that there was substantial evidence before the commission sustaining the action of the President. Carl Zeiss, Inc. v. United States, 23 C. C. P. A. (Customs) 7, T. D. 47654.

I find nothing in the record in the case at bar to indicate that the commission might not have come to the same conclusion as to the rates recommended if it had not erred in its application of the rate of exchange to the invoices of 1931. There is nothing in the report of the commission or in the record indicating that it did not also have before it invoice prices of imports from Japan, in terms of yen, for the years 1933 and immediately preceding the date of its report, which was April 5, 1934. If the average prices shown by such invoices were in yen approximately the same as the prices in 1931 and 1932, and if the commission had converted the yen prices on invoices of 1931 upon the rate of exchange prevailing in 1931, we think it would have been fully justified in holding that the difference in the rate of exchange prevailing in 1931 and 1932 and that prevailing in 1933 and 1934 was a relevant factor in determining the differences in costs of production at the date of its report, which, after all, was the ultimate objective of the investigation, and that, in order to recommend to the President a rate which would equalize the differences in such cost of production, the depreciation in the value of the yen, measured in U. S. dollars, should be taken into consideration. This being true, the President could have legally approved the rate recommended by the Tariff Commission. Furthermore, I call attention to the fact that the commission in its report stated that the recommended rate is less than the excess of domestic over foreign costs. The reason that no higher rate was recommended was that the statute, section 336, did not permit it. The situation, therefore, was that the President could have found upon the facts before the commission a less difference between the cost of production of domestic and foreign articles than that found by the commission, and yet have approved the rate recommended by it.

I contend that any conclusion arrived at by the commission from the facts secured in its investigation is not a part of the investigation and may lawfully be ignored by the President. Section 336 (e) provides that the President shall by proclamation approve the rates recommended by the commission "if *in his judgment* such rates of duty and

changes are shown *by such investigation of the commission* to be necessary to equalize such differences in costs of production." [Italics supplied.]

Surely it cannot be said, in view of the above-quoted language, that the conclusions of the commission are a part of the investigation in the sense that an error of law by the commission in arriving at its conclusions renders the investigation illegal.

Furthermore section 336(a) distinguishes between the "results of the investigation" and the investigation itself, clearly indicating that the findings of the commission from the facts adduced before it are not strictly a part of the investigation itself.

The predecessor of section 336 was section 315 of the Tariff Act of 1922. One of the principal differences between the two sections is that in section 315 the President, in arriving at his determination, was not confined to a consideration of the facts secured by the commission, while under section 336 he is so limited.

However, so far as the question before us is concerned, I consider certain of our decisions under the Tariff Act of 1922 applicable here.

In the case of William N. Foster & Co. (Inc.) et al. v. United States, 20 C. C. P. A. (Customs) 15, T. D. 45673, we said:

"In determining this matter, it will be borne in mind that we are here concerned with the legality of the President's act in raising the rates on case polished plate glass, unsilvered, from the statutory figure to that fixed by his proclamation. The question is not whether the United States Tariff Commission committed error, or whether the testimony heard by, or the findings of, the commission were sufficient to legally justify the President's finding and proclaimed rates. The President is not bound by such testimony or findings. He may arrive at his conclusions from information derived from other sources, which information may be privately conveyed and confidentially received. The various elements which he must take into consideration, as fixed by said section 315 (c), give him wide latitude. Therefore, it is fallacious to argue that possible error committed by the Tariff Commission, or failure of proof before that body, may invalidate the President's finding and proclamation. Such hearing before the United States Tariff Commission is provided by law 'to assist the President,' not to control him."

Except for the fact that under the Tariff Act of 1930 the President is bound by the testimony adduced before the commission, while under the act of 1922 he was not, the language last above quoted is clearly applicable to the case at bar. Here, as there, the President is not bound by the findings of the commission, and here, as there, it is fallacious to argue that error committed by the Tariff Commission in its findings may "invalidate the President's finding and proclamation."

In the case of Akawo & Co. et al. v. United States, 23 C. C. P. A. (Customs) 75, T. D. 47737, we said:

"* * * The mere fact that the Tariff Commission may have committed error, although we find no evidence of it, so long as its investi-

gation was a legal one, is not of vital consequence so far as the provisions of section 315, supra, are concerned. * * *"

The case of Feltex Corp. etc. v. Dutchess Hat Works, etc., 21 C. C. P. A. (Customs) 463, T. D. 46957, arose under the Tariff Act of 1930 and section 336 was there, as it is here, involved. In that case we said:

"By section 336 (c) the President is not in any way bound by the 'results' or 'findings' reported by the Tariff Commission. He is required to approve the rates specified by it if, in his judgment, such rates are 'shown by such investigation' to be necessary to equalize such differences in costs of production. In forming his judgment, as aforesaid, he is not limited to an examination of the report of the Commission. There is nothing in the statute which expressly or impliedly so requires. One of the principal distinctions between section 336 of the Tariff Act of 1930 and section 315 of the Tariff Act of 1922 is that under said section 315 the President could make any investigation that he saw fit, and might specify any increases or decreases in rates that in his judgment were necessary to equalize costs of production, subject to the limitation that such increases or decreases must not exceed 50 per centum of the rates specified under title I of the Tariff Act of 1922. Before he could so act, however, the Tariff Commission must have made *an* investigation of the differences in costs of production of the merchandise the subject matter of the President's proclamation.

"Under the provisions of section 336 of the Tariff Act of 1930 the President, in forming his judgment, is confined to a consideration of the facts secured by the Tariff Commission in its investigation, and is further limited to approval of the rates specified by the Commission if he finds, from such investigation, that the rates so specified are necessary to equalize costs of production.

"We can find nothing in the statute which limits the President to a consideration of the report of the Tariff Commission, but we think the fair construction of section 336 is that the President, upon a report coming to him from the Tariff Commission, may require such Commission to place before him all the facts secured by it in its investigation, and from such facts the President may determine whether the rates specified in the report of the Commission should be approved.

"If the Commission should, in a given case, report only its conclusions, it is clear that the President, if he is confined to the *report* of the Commission in arriving at his judgment, would have no facts whatever upon which to base his judgment but only conclusions of the Commission. It is our opinion that it was the intention of Congress that the President should consider all the relevant facts before the Commission in its investigation in arriving at his judgment, and that, in arriving at such judgment, he is not confined to a consideration of the report of the Commission other than that he must approve or disapprove the rates specified by the Commission in its report.

* * * * * * *

"We think it immaterial, so far as the question of the validity of said proclamation is concerned, what report the Commission may have made as to the *results* of its investigations or what findings it may have made, other than its finding that the rates specified by it were necessary to equalize the differences in costs of production of the merchandise under investigation. If the President, upon an examination of all the facts before the Commission, had any legal basis for a finding that such rates were necessary to equalize costs of production, his proclamation is valid."

In my judgment the majority opinion clearly overrules so much of our opinion in the Feltex case as is above quoted.

In the case of Carl Zeiss, Inc. v. United States, supra, which also arose under section 336 of the Tariff Act of 1930, we stated:

"The President, although not required by the provisions of section 336, supra, to accept the results or findings reported by the Tariff Commission, is required to limit his consideration of the case to the evidence presented to that body, and to approve the rates of duty and changes in basis of value specified by it,

'if in his judgment such rates, [and changes in basis of value] are shown by the investigation to be necessary to equalize such differences in costs of production.'"

Feltex Corp. v. Duchess Hat Works, 21 C. C. P. A. (Customs) 463, T. D. 46957.

Under the majority opinion every error of the Tariff Commission arising from failure by it to comply with the mandate of section 336 in making its findings renders the entire investigation illegal and the ensuing proclamation of the President, approving the rates specified, void. To illustrate how far reaching this ruling is, I call attention to other provisions of section 336 where such ruling may be applied. Under subdivision (e) (2) of said section the commission is required, in so far as it finds it practicable, in ascertaining the differences in cost of production, to consider transportation costs. If it should appear from the report of the commission that there were transportation costs and that the commission in making its findings had failed to consider them, the entire investigation would be illegal and the proclamation of the President would be void, even though the proclamation should recite that the President had, in arriving at his determination, taken into consideration such costs.

Under section 336 (h) (4) it is provided that the cost of production shall include the cost of containers of the merchandise; but under the majority opinion, if it appeared from the report of the commission that it had not considered the cost of containers, the entire investigation would be illegal, and the President's proclamation would be void, even though the proclamation should recite that the evidence before the commission established the cost of the containers and that the President had considered such cost in approving the rates recommended by the commission.

Other illustrations might be given where, under the view of the majority, an entire investigation would be rendered illegal through some error in the findings of the commission, which findings, we have repeatedly said, are not binding upon the President.

In conclusion, it is my view that if an investigation is held, with due notice and opportunity to be heard, and if there is substantial evidence produced before the commission to sustain the proclamation of the President, and the President in making his determination has complied with the mandate of the statute, such proclamation is valid, notwithstanding any errors made by the commission in its findings.

There being nothing in the record before us indicating that there was no substantial evidence before the commission sustaining the proclamation of the President, and the evidence before the commission not being before us, the presumption of the validity of the President's proclamation has not been overcome, and the judgment appealed from should be affirmed.

United States Court of Customs and Patent Appeals

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

October term, 1938. Customs Appeal No. 4173. Customs Calendar No. 30

JACKSON, Judge, Dissenting: There is nothing expressly contained in section 336 of the Tariff Act of 1930 which would render it mandatory to convert foreign currency as held by the majority. While it is quite true that provision is made therein for the establishment of cost of production of a foreign article by taking the weighted average of the invoice prices for a representative period, it does not necessarily follow that in converting the said costs from foreign currency into dollars; any particular exchange rate for the same period be used, excluding, of course, arbitrary and capricious action. Moreover, the said statute states that the commission may consider "other relevant factors that constitute an advantage or disadvantage in competition." The fluctuating value of the yen during the represenative period fixed by the commission, in my opinion, is certainly a relevant factor affecting competition and was properly considered by the commission and such consideration is within its statutory authority.

The investigation for finding the difference in cost of production between a domestic and a like or similar foreign article has for its purpose the equalization of said costs, and a situation may arise in an investigation where the cost of production of the foreign article based upon the weighted average of the invoice prices "is not representative

of the present or future invoice values in terms of dollars" as was found by the commission here. This is a finding of fact. The change in rate of duty, classification or basis of value which may be found to be necessary is not for the present nor for the representative period. It is for the future protection of domestic industry.

The only express statutory authority which appellant contends supports its view is section 522 (b) of the said tariff act. It reads as follows:

"SEC. 522. CONVERSION OF CURRENCY.

* * * * * * *

"(b) Proclaimed Value Basis of Conversion.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of the enactment of this Act wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported."

In my opinion, section 522 (b), supra, has no application to the issue presented. By its very language it applies only for the purpose of the assessment and collection of duties. The Tariff Commission possesses no right or duty in respect to the assessment and collection of duties upon imported merchandise. Its function is to investigate, make findings, and report such findings to the President. It is an exclusive agency of Congress and is limited by statute to the narrow purpose of collecting facts so that costs of production may be equalized as far as tariff duty is concerned in this country and abroad.

Had Congress intended that the Tariff Commission should be bound in converting foreign currency into American dollars, as held by the majority, I think it surely would have so stated in either of sections 336 or 522 (b), supra.

In my opinion the commission acted entirely within the scope of its statutory authority. However, if I am in error as to this, the conclusion reached by the majority, in my opinion, is correct.

United States Court of Customs and Patent Appeals

Thursday, June 15, 1939

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 15th day of June, A. D. 1939.

Present the Honorable Finis J. Garrett, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Irvine L. Lenroot, and Joseph R. Jackson, Associate Judges.

The court was opened for business in due form.

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

Customs Appeal No. 4173.

Said appeal having heretofore been brought on to be heard before he court and due consideration thereon having been had, it is:
Ordered that the judgment of the United States Customs Court be, nd the same is hereby, reversed, and said cause is remanded to said ourt for proceedings consistent with the views expressed in the opin-n of this court herein.

* * * * * * *

United States Court of Customs and Patent Appeals

Docket entry

July 8, 1939. Sixteen copies petition of appellee for rehearing filed.

United States Court of Customs and Patent Appeals

Monday, October 2, 1939

At a session of said court continued and held at the city of Wash-ngton, pursuant to adjournment, on this 2nd day of October, A. D., 939.
Present the Honorable Finis J. Garrett, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Irvine L. Lenroot, nd Joseph R. Jackson, Associate Judges.
The court was opened for business in due form.

* * * * * * *

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

Customs Appeal No. 4173

Appellee having heretofore filed petition for rehearing herein, and e consideration thereon having been had, it is
Ordered that said petition be, and the same is hereby, denied.

* * * * * * *

United States Court of Customs and Patent Appeals

Docket entries

October 12, 1939. Motion of appellee to defer issuing final man-e until 3 months from October 2, 1939.

October 20, 1939. Appellant offers no objection to stay of final mandate.

October 23, 1939. Final mandate stayed for 3 months from October 2, 1939.

Certificate of clerk

United States Court of Customs and Patent Appeals

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

Customs Appeal No. 4173

I, Arthur B. Shelton, Clerk of the United States Court of Customs and Patent Appeals, do hereby certify that the attached pages, numbered 1 to 109, inclusive, contain a true and complete transcript of the record and certain proceedings had in said court in the above-entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 27th day of November A. D. 1939.

[SEAL]

ARTHUR B. SHELTON,
Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed February 5, 1940

The petition herein for a writ of certiorari to the U. S. Court of Customs and Patent Appeals is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 44020. U. S. Court of Customs and Patent Appeals. Term No. 613. The United States of America, petitioner vs. George S. Bush & Co., Inc. Petition for a writ of certiorari and exhibit thereto. Filed December 29, 1939. Term No. 613 O. T. 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1940

No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNITED STATES, PETITIONER

v.

GEORGE S. BUSH & CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	6
Reasons for granting the writ	7
Conclusion	13
Appendix	14

CITATIONS

Case:	
Norwegian Nitrogen Co. v. *United States*, 288 U. S. 294	9
Statutes:	
Tariff Act of 1930, c. 497, 46 Stat. 590:	
Sec. 336	14
Sec. 402	18
Miscellaneous:	
62 Cong. Rec. 37, 12508	10
Edie, *Dollars*	11
H. Rep. No. 248, 67th Cong., 1st Sess	10
S. Rep. No. 595, 67th Cong., 2d Sess	10

199538—39——1

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNITED STATES, PETITIONER

v.

GEORGE S. BUSH & CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals entered June 15, 1939, reversing a judgment of the United States Customs Court.

OPINIONS BELOW

The opinion of the trial court (R. 51–60) is reported in R. D. 4034, 71 Treas. Dec. 1291. The opinion of the Customs Court, appellate term (R. 63–75), is reported in R. D. 4253, 73 Treas. Dec. 1432. The opinions in the Court of Customs and Patent Appeals (R. 77–92) are reported in 104 F. (2d) 368.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered June 15, 1939 (R. 92–93). A petition for rehearing was denied October 2, 1939 (R. 93).

The jurisdiction of this Court is invoked under Section 195 of the Judicial Code, as amended (28 U. S. C., sec. 308).

QUESTIONS PRESENTED

Pursuant to Section 336 of the Tariff Act of 1930, the United States Tariff Commission conducted an investigation to ascertain the difference in the costs of production of canned clams in the United States and in Japan, the principal competing country. It reported the results of its investigation to the President of the United States, who thereupon issued a proclamation increasing the duty on canned clams. The present suit was brought by an importer of canned clams, alleging the proclamation of the President to be void. The questions presented are: (1) whether the Customs Court has power to review the facts and the reasoning upon which the Tariff Commission based its recommendation to the President, and if dissatisfied to declare the proclamation void; and (2) if the court has such power whether the Tariff Commission erred in its method of ascertaining the Japanese cost of production of canned clams.

STATUTES INVOLVED

The relevant portions of the Tariff Act of 1930, c. 497, 46 Stat. 590, are set forth in the Appendix, *infra*, pp. 14–19.

STATEMENT

On May 1, 1934, the President of the United States proclaimed that a change in the duty on canned clams was necessary to equalize the difference in the costs of production in the United States and in the principal competing country, Japan, and that the duty, which up

to that time had been at the rate of 35% ad valorem on *a foreign value basis,* as defined in Section 402 (c) of the Tariff Act of 1930, should be changed to 35% ad valorem *on the basis of the American selling price,* as defined in Section 402 (g) of the Act (R. 49–50). The proclamation was made after an investigation and report by the United States Tariff Commission under the flexible tariff provisions of the Tariff Act of 1930 (R. 13). Section 336 (c. 497, 46 Stat. 590, 701), *infra,* p. 14.

The Commission instituted the investigation on June 28, 1932, in response to an application for an increase in the duty on all canned clams. Public notice of the hearing was given on the same date. The hearing was held on October 5, 1932, and interested parties were given an opportunity to be present, to produce evidence and to be heard (R. 21). As a result of its investigation the Commission found that the duty of 35% ad valorem on the foreign dutiable value fixed by the statute did not equalize the difference in the costs of production of the domestic article and the Japanese article and that the rate of duty necessary to equalize the difference, within the limits permitted by Section 336 (b) of Title III of the Tariff Act of 1930, was 35% ad valorem based upon the American selling price of the domestic article (R. 26). It accordingly recommended to the President this change in the basis of value (R. 21) and its recommendation was approved by the President in his proclamation of May 1, 1934 (R. 50).

In computing the Japanese costs of production the Commission, pursuant to the authority conferred upon it by Section 336 (e) (2) (A), *infra,* p. 16, accepted

as evidence of cost the weighted average of the invoice prices of Japanese canned clams entered at San Francisco, the principal port of entry, for a representative period. The period considered as representative extended from December 1, 1930, to September 30, 1932 (R. 36). Since, however, the invoice prices were in terms of Japanese yen it was necessary, for purposes of comparison with domestic costs, to convert the Japanese costs so determined into terms of United States dollars. This was done at the average rate of exchange for 1932 (R. 24). The reason that the 1932 rate of exchange was used was that Japan went off the gold standard on December 13, 1931, and the value of the yen in terms of United States dollars declined steadily from that date until November 1932, when it was worth only $0.2062 as against its par value of $0.4985 (R. 39). After that time the yen increased somewhat in value (*id.*), but at the time of the Commission's report to the President the prevailing rate of exchange was not much higher than the average rate for 1932 (R. 24). With respect to this matter the Commission found as follows (R. 24):

> 6. The years 1931 and 1932 are representative with respect to the domestic cost of production of canned clams and the invoice prices of Japanese canned clams, in terms of Japanese currency. During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the

present or probable future invoice values in terms of dollars. The commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932. Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932.

After the President issued his proclamation, the respondent imported some canned clams and they were appraised, pursuant to the proclamation, on the basis of the American selling price. The importer filed an appeal for reappraisement with the United States Customs Court, pursuant to Section 501 of the Tariff Act of 1930. At the trial he contended that the proclamation changing the basis of value was invalid and that the proper basis for appraising the merchandise was the foreign value as defined in Section 402 (c). It was admitted that the Commission had proceeded properly in ascertaining the foreign and domestic costs and that the period selected as representative for determining the weighted average of invoice prices was proper. The validity of the proclamation was challenged solely on the ground that the Commission had no legal authority to use one period to ascertain the weighted average of invoice prices in Japanese yen and another period to ascertain the rate of exchange for converting the yen into United States dollars.

The judge of the Customs Court sitting in reappraisement sustained the appraised value, holding that the matters complained of concerned merely the internal

fact-finding processes of the Tariff Commission and the President and that these matters were not justiciable (R. 51–60). On appeal to the appellate division of the Customs Court the judgment of the single judge was affirmed (R. 63–75). On appeal to the Court of Customs and Patent Appeals the judgment of the Customs Court was reversed, two judges dissenting (R. 77–92).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that the Customs Court had no power to review the facts or the reasoning upon which the Tariff Commission based its recommendation to the President for an increase in the duty on canned clams.

2. In holding that Section 336 (e) (2) (A) of the Tariff Act of 1930 prohibited the Tariff Commission from using a different period for ascertaining the proper rate of exchange at which to convert Japanese yen into terms of United States dollars from the period selected as representative in determining the weighted average of the invoice prices of the Japanese canned clams.

3. In holding that the provision of Section 336 (e) (2) (A) that the Tariff Commission may accept as evidence of the cost of production of a foreign article "the weighted average of the invoice prices or values for a representative period" should be construed to require the Commission to ascertain the invoice prices in United States currency for that period.

4. In holding that the investigation made by the Tariff Commission was illegal and that the proclamation

by the President, based upon such investigation, was illegal and void.

5. In holding that the conversion of currency is involved in finding the basic cost of production of a foreign article.

6. In reversing the judgment of the Customs Court.

REASONS FOR GRANTING THE WRIT

The question decided by the Court of Customs and Patent Appeals is one of first impression. Although there is, therefore, no conflict of decisions, the decision below, if allowed to stand, will in large measure destroy the usefulness of the flexible tariff provisions of the Tariff Act of 1930 by prohibiting prompt and effective changes in tariff duties to offset changing trade conditions caused by foreign currency fluctuations. The question cannot well arise in courts other than the Customs courts. Consequently there is involved a question of federal law of large public importance which has not been, but should be, settled by this Court.

1. Both the judge sitting in reappraisement and the appellate division of the Customs Court held that the action of the Tariff Commission in converting the weighted average invoice prices of the canned clams from yen into dollars at the average rate of exchange for 1932 was not subject to judicial review. They pointed out that the necessary prerequisites to the issuance of a proclamation by the President—i. e., an investigation by the Tariff Commission, a public hearing and notice thereof to all interested parties, and a report by the Tariff Commission to the President—were conceded to exist. These jurisdictional requisites

being established, they believed that it was not within the power of the court to review the facts and reasoning upon which the Commission based its recommendation to the President or upon which the President based his approval of that recommendation.

The court below did not expressly discuss this question of jurisdiction. It held merely that the statute prohibited the Commission from using a different period for ascertaining the rate of exchange for conversion purposes from the period selected as representative in determining the weighted average of the invoice prices, that because the Commission had used such a different period in violation of the statute its investigation was "illegal," and that, therefore, "the proclamation by the President, based upon such investigation, was without authority of law, illegal, and void" (R. 86).

We have found no authority for the proposition that if the Tariff Commission follows an erroneous method for ascertaining foreign costs of production its investigation is therefore "illegal," and a necessary jurisdictional prerequisite to the issuance of a proclamation by the President is lacking. That the court's holding is erroneous we believe to be well illustrated by the present record. The Commission's report sets forth all of the relevant facts. It details the imports of Japanese canned clams for the period from December 1, 1930, to September 30, 1932, conceded by respondent to be representative, the dutiable value of the merchandise in Japanese currency, and the dutiable value of the merchandise converted into United States currency both at the prevailing rate of exchange at the date of export and at the average rate of exchange for the year 1932

(R. 37). No provision of law required it to set forth the reasoning by which it drew its conclusion from these facts; that it did set forth its reasoning, and that that reasoning, in the view of the court below, was based upon an erroneous interpretation of the statute, does not invalidate its investigation or its recommendation, much less the proclamation of the President. Indeed, it does not appear from the proclamation whether the President accepted the reasoning of the Tariff Commission or predicated his approval of the Commission's recommendation upon his own conclusions drawn from the facts set forth in the Commission's report.

This Court has held that what is done by the Tariff Commission and the President in changing tariff rates to conform to new conditions is in substance one stage of the legislative process. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 305. In that case the Court pointed out (p. 318) that no one has a legal right to the maintenance of an existing rate or duty, and that the action of the President in exercising his delegated power to change the duty is not subject to impeachment "if the prescribed forms of legislation have been regularly observed." Here the investigation conducted by the Commission, the hearing which it held after due notice to all interested parties, its report to the President and his proclamation approving the Commission's recommendation, constituted a full and regular observance of the forms prescribed. That being so, there can be no judicial review of the legislative judgment reached by the Commission and the President, and *a fortiori* no review of the facts and the reasoning on which that judgment was based.

2. The court below in terms construed Section 336 (e) (2) (A) as though it read "the commission may accept as evidence of the cost of production of a foreign article the weighted average of the invoice prices or values *in United States currency for a representative period*" (R. 82), and held that the Commission, in finding the Japanese cost of the article, was obliged to convert such cost from Japanese yen into United States dollars at the average rate of exchange for the representative period used by the Commission to ascertain the invoice prices of the article. This holding has no warrant in the provisions of the Tariff Act of 1930 and, to a very large extent, nullifies the intention of Congress in enacting the flexible tariff provision.

The purpose of the flexible tariff provision is to permit prompt changes in the amount of duty payable on imported merchandise in order to meet changing conditions of commerce, and the legislative history of the provision shows plainly that fluctuating foreign exchange was one of the important factors which Congress considered as creating the need for a flexible tariff law. H. Rep. No. 248, 67th Cong., 1st Sess., part 1, p. 20; S. Rep. No. 595, 67th Cong., 2d Sess., pp. 6–7; 62 Cong. Rec. 37; *id.*, part 12, p. 12508. Under the decision of the court below, the provision is rendered largely useless for this purpose.

The facts of the present case illustrate the point. The need for a change in the duty on canned clams arose primarily from the fact that Japan went off the gold standard on December 13, 1931. By June 1932, when the Commission instituted its investigation, the yen had greatly depreciated in terms of United States dollars,

thereby greatly increasing the difference, in terms of dollars, between the Japanese and domestic costs of production. In order to determine the Japanese cost of production by use of weighted-average invoice prices, the Commission was required to use invoice prices over a period extending for a considerable time before the start of its investigation, when the exchange rate of the yen was substantially higher than it was in 1932. If the Commission were required, as the court below held, to convert the invoice prices into terms of United States currency at the prevailing rate on the date of exportation, the difference between the Japanese costs of production, so determined, and the domestic costs of production would not reflect the depreciation in the value of the yen—the very fact necessitating the change in duty. The only way in which the conversion could be made so as to reflect the difference in the costs of production at the time of the Commission's investigation was by means of the method actually used—i. e., to determine the Japanese costs of production in yen over a representative period and then to convert those costs into dollars at the average rate of exchange prevailing at the time of the investigation.

There is nothing arbitrary in this method of ascertaining costs. Depreciation of the currency of a country in terms of foreign exchange has, at least over limited periods of time, a relatively small influence upon the domestic value of that currency and upon the domestic costs of production, expressed in terms of that currency. See, e. g., Edie, *Dollars,* pp. 94–95. Thus the Commission was fairly entitled to assume that, despite the fact that Japan went off the gold standard

on December 13, 1931, the weighted average invoice prices of the Japanese canned clams for the 22-month period which it took as representative accurately reflected the Japanese cost of production, in yen, at the time of its investigation. But in order to determine the Japanese costs of production, in dollars, at the time of its investigation, it was required to convert the yen into dollars at the average rate of exchange then prevailing. Had it made the conversion at the rate prevailing during the 22-month period of importation it would have been using a rate which had merely an historical interest and which did not represent conditions as they actually existed at the time that action under the flexible tariff provision was being considered.

It is clear that under the decision below the Commission and the President will be prevented from making such prompt modifications of tariff duties as are necessary to offset changes in the value of foreign currencies. In a case where the value of the currency of a given country has undergone a sudden and material change, an investigation in which the old rate of exchange is applied as the conversion factor would in most cases show little or no need for equalization, even though the depreciation of the foreign currency quite obviously made equalization highly necessary. The foreign article would therefore enjoy an advantage in competition with the domestic article which the Commission and the President would be powerless to prevent until another investigation could be made. And, even then, a further fluctuation of the foreign currency might produce a similar result at the end of the later investigation. Thus, under the decision of the court

below, the Commission and the President are effectively prevented from carrying out the intention of Congress in enacting the flexible tariff provision in almost every case where currency fluctuation is a major factor.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

DECEMBER 1939.

APPENDIX

Tariff Act of 1930, c. 497, 46 Stat. 590 (U. S. C., Title 19, Sec. 1336):

SEC. 336. EQUALIZATION OF COSTS OF PRODUCTION.

(a) Change of Classification or Duties.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds

shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

(b) Change to American Selling Price.—If the commission finds upon any such investigation that such differences can not be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

(c) Proclamation by the President.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

(d) Effective Date of Rates and Changes.—Commencing thirty days after the date of any presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in basis of value specified in the report of the commission shall take effect.

(e) Ascertainment of Differences in Costs of Production.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, in so far as it finds it practicable:

(1) In the Case of a Domestic Article.—(A) The cost of production as hereinafter in this section defined; (B) transportation costs and other

costs incident to delivery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

(2) In the Case of a Foreign Article.—(A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for a representative period, and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets); (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

(f) Modification of Changes in Duty.—Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes.

(g) Prohibition Against Transfers from the Free List to the Dutiable List or from the Dutiable List to the Free List.—Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is, pro-

vided in any paragraph of Title I of this Act, or in any amendatory Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(h) Definitions.—For the purpose of this section—

(1) The term "domestic article" means an article wholly or in part the growth or product of the United States; and the term "foreign article" means an article wholly or in part the growth or product of a foreign country.

(2) The term "United States" includes the several States and Territories and the District of Columbia.

(3) The term "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions).

(4) The term "cost of production", when applied with respect to either a domestic article or a foreign article, includes, for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in its production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

(i) Rules and Regulations of President.—The President is authorized to make all needful rules

and regulations for carrying out his functions under the provisions of this section.

(j) Rules and Regulations of Secretary of Treasury.—The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of foreign articles of the class or kind of articles with respect to which a change in basis of value has been made under the provisions of subdivision (b) of this section, and for the form of invoice required at the time of entry.

(k) Investigations Prior to Enactment of Act.—All uncompleted investigations instituted prior to the approval of this Act under the provisions of section 315 of the Tariff Act of 1922, including investigations in which the President has not proclaimed changes in classification or in basis of value or increases or decreases in rates of duty, shall be dismissed without prejudice; but the information and evidence secured by the commission in any such investigation may be given due consideration in any investigation instituted under the provisions of this section.

* * * * * *

SEC. 402. VALUE.

* * * * * *

(d) Export Value.—The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses inci-

dent to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * *

(g) American Selling Price.—The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.

No. 613

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNITED STATES, PETITIONER

v.

GEORGE S. BUSH & CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	7
Summary of Argument	8
Argument:	
I. The Customs Court had no power to review the facts and reasoning on which the Tariff Commission based its recommendation to the President	10
II. The Tariff Commission committed no error in ascertaining the foreign costs of production	18
Conclusion	27
Appendix	28

CITATIONS

Cases:	
Adams v. *Nagle*, 303 U. S. 532	16
Dakota Central Tel. Co. v. *South Dakota*, 250 U. S. 163	13
Hampton & Co. v. *United States*, 276 U. S. 394	26
Martin v. *Mott*, 12 Wheat. 19	13
Moss Co., Inc., David L. v. *United States*, 103 F (2d) 395	16
Monongahela Bridge v. *United States*, 216 U. S. 177	13
Norwegian Nitrogen Products Co. v. *United States*, 288 U. S. 294	8, 14, 16
Pacific States Co. v. *White*, 296 U. S. 176	16
Philadelphia & Trenton R. R. Co. v. *Stimpson*, 14 Pet. 448	13, 18
Sterling v. *Constantin*, 287 U. S. 378	13
United States v. *Chemical Foundation*, 272 U. S. 1	13, 14, 18
Statutes:	
Tariff Act of 1922, c. 356, 42 Stat. 858, Sec. 315	21
Tariff Act of 1930, c. 497, 46 Stat. 590 (U. S. C., Title 19, Sec. 1336):	
Sec. 336	2, 3, 4, 7, 9, 10, 11, 12, 18, 19, 20, 21, 24, 25, 26, 28
Sec. 402	3, 6, 33
Miscellaneous:	
61 Cong. Rec. 3477, 3478, 4198	21
62 Cong. Rec. 37	21
62 Cong. Rec. 11627	21

214865—40——1

Miscellaneous—Continued. Page

62 Cong. Rec. 11186, 11189 21
62 Cong. Rec. 12508 21
62 Cong. Rec. 12718 21
Edie, *Dollars*, pp. 94–95 23
Harris, *Exchange Depreciation* (1936), p. 474 23
H. R. 7456, 67th Cong., 1st Sess 21
H. Rep. No. 248, 67th Cong., 1st Sess., p. 21 21
League of Nations World Economic Survey, 1932–1933, pp. 41–42 23
S. Rep. No. 595, 67th Cong., 2d Sess., pp. 3, 6–7 21
Treasury Decisions, Vol. 75, No. 33 (Feb. 15, 1940), p. 2 .. 5

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 613

THE UNITED STATES, PETITIONER

v.

GEORGE S. BUSH & CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the trial court (R. 39–46) is reported in R. D. 4034, 71 Treas. Dec. 1291. The opinion of the Customs Court, appellate term (R. 48–58), is reported in R. D. 4253, 73 Treas. Dec. 1432. The opinions in the Court of Customs and Patent Appeals (R. 61–76) are reported in 104 F. (2d) 368.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered June 15, 1939 (R. 77). A petition for rehearing was denied October 2, 1939

(R. 77). The petition for a writ of certiorari was filed on December 29, 1939, and was granted on February 5, 1940 (R. 79). The jurisdiction of this Court is invoked under section 195 of the Judicial Code, as amended (28 U. S. C. sec. 308).

QUESTIONS PRESENTED

Pursuant to section 336 of the Tariff Act of 1930 the United States Tariff Commission conducted an investigation to ascertain the difference in the costs of production of canned clams in the United States and in Japan, the principal competing country. It reported the results of its investigation to the President of the United States, who thereupon issued a proclamation increasing the duty on canned clams. The present suit was brought by an importer of canned clams, alleging the proclamation of the President to be void. The questions are: (1) Whether the Customs Court has power to review the facts and the reasoning upon which the Tariff Commission based its recommendation to the President, and if dissatisfied to declare the proclamation void; and (2) if the court has such power, whether the Tariff Commission erred in its method of ascertaining the Japanese cost of production of canned clams.

STATUTES INVOLVED

The relevant portions of the Tariff Act of 1930, c. 497, 46 Stat. 590, are set forth in the Appendix, *infra*, pp. 28–34.

STATEMENT

On May 1, 1934, the President of the United States proclaimed that a change in the duty on canned clams was necessary to equalize the difference in the costs of production in the United States and in the principal competing country, Japan, and that the duty, which up to that time had been at the rate of 35% ad valorem *on a foreign value basis,* as defined in section 402 (e) of the Tariff Act of 1930, should be changed to 35% ad valorem *on the basis of the American selling price,* as defined in section 402 (g) of the Act (R. 37–38). The proclamation was made after an investigation and report by the United States Tariff Commission under the flexible tariff provisions of the Tariff Act of 1930 (R. 9–37). Section 336 (c. 497, 46 Stat. 590, 701).

The Commission instituted the investigation on June 28, 1932, in response to an application for an increase in the duty on all canned clams. Public notice of a hearing was given on the same date. The hearing was held on October 5, 1932, and interested parties were given an opportunity to be present, to produce evidence, and to be heard (R. 11). As a result of its investigation the Commission found that the duty of 35% ad valorem on the foreign dutiable value fixed by the statute did not equalize the difference in the costs of production of the domestic article and the Japanese article and that the rate of duty necessary to equalize the dif-

ference, within the limits permitted by section 336 (b) of Title III of the Tariff Act of 1930, was 35% ad valorem based upon the American selling price of the domestic article (R. 17). It accordingly recommended to the President this change in the basis of value (R. 11) and its recommendation was approved by the President in his proclamation of May 1, 1934 (R. 38).

In computing the Japanese costs of production the Commission, pursuant to the authority conferred upon it by section 336 (e) (2) (A), accepted as evidence of cost of production the weighted average of the invoice prices of Japanese canned clams entered at San Francisco, the principal port of entry, for a representative period. The period considered as representative extended from December 1, 1930, to September 30, 1932 (R. 27). Since, however, the invoice prices were in terms of Japanese yen it was necessary, for purposes of comparison with domestic costs, to convert the Japanese costs so determined into terms of United States dollars. This was done at the average rate of exchange for 1932 (R. 14). The reason that the 1932 rate of exchange was used was that Japan went off the gold standard on December 13, 1931, and the value of the yen in terms of United States dollars declined steadily from that date until November 1932 when it was worth only $0.2062 as against its par value of $0.4985 (R. 30). After that time the yen increased somewhat in value (*id.*), but at the time of the Commission's report to the President

the prevailing rate of exchange was not much higher than the average rate for 1932 (R. 14).[1] With respect to this matter the Commission reported to the President as follows (R. 14):

> 6. The years 1931 and 1932 are representative with respect to the domestic cost of production of canned clams and the invoice prices of Japanese canned clams, in terms of Japanese currency. During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or probable future invoice values in terms of dollars. The Commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932. Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932.

After the President issued his proclamation, the respondent imported some canned clams and they

[1] The average rate of exchange for the year 1932 was $0.2811 (R. 28). The present rate of exchange, as certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, is $0.2343. Treasury Decisions, Vol. 75, No. 33 (February 15, 1940), p. 2.

were appraised, pursuant to the proclamation, on the basis of the American selling price. The respondent filed an appeal for reappraisement with the United States Customs Court, pursuant to section 501 of the Tariff Act of 1930. At the trial respondent contended that the proclamation changing the basis of value was invalid and that the proper basis for appraising the merchandise was the foreign value as defined in section 402 (c). It was admitted that the Commission had proceeded properly in ascertaining the Japanese cost of production, in yen, by use of a weighted average of invoice prices or values, and that the period selected as representative for this purpose was proper. The validity of the proclamation was challenged primarily on the ground that the Commission had no legal authority to use one period to ascertain the weighted average of invoice prices in yen and another period to ascertain the rate of exchange for converting the yen into United States dollars.

The judge of the Customs Court sitting in reappraisement sustained the appraised value, holding that the matters complained of concerned merely the internal fact-finding processes of the Tariff Commission and the President and that these matters were not justiciable (R. 39–46). On appeal to the appellate division of the Customs Court the judgment of the single judge was affirmed (R. 48–58). On appeal to the Court of Customs and Patent Appeals the judgment of the Customs

Court was reversed, two judges dissenting. (R. 61–76).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that the Customs Court had no power to review the facts or the reasoning upon which the Tariff Commission based its recommendation to the President for an increase in the duty on canned clams.

2. In holding that section 336 (e) (2) (A) of the Tariff Act of 1930 prohibited the Tariff Commission from using a different period for ascertaining the proper rate of exchange at which to convert Japanese yen into terms of United States dollars from the period selected as representative in determining the weighted average of the invoice prices of the Japanese canned clams.

3. In holding that the provision of section 336 (e) (2) (A) that the Tariff Commission may accept as evidence of the cost of production of a foreign article, "the weighted average of the invoice prices or values for a representative period" should be construed to require the Commission to ascertain the invoice prices in United States currency for that period.

4. In holding that the investigation made by the Tariff Commission was illegal and that the proclamation by the President, based upon such investigation, was illegal and void.

5. In holding that the conversion of currency is

involved in finding the basic cost of production of a foreign article.

6. In reversing the judgment of the Customs Court.

SUMMARY OF ARGUMENT

I

The court below had no power to review the facts and reasoning on which the Tariff Commission based its recommendation to the President and to declare the President's proclamation void because it believed that the Commission had erroneously interpreted the Tariff Act in ascertaining the foreign costs of production. The action taken by the President and the Commission was in substance one stage of the legislative process. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294. Such action is not subject to judicial impeachment if the prescribed forms of legislation have been regularly observed. *Id.* Here the investigation conducted by the Commission, the hearing which it held after due notice to all interested parties, its report to the President, and his proclamation approving the Commission's recommendation constituted a full and regular observance of the forms prescribed. Under these circumstances there can be no judicial review of the legislative judgment reached by the Commission and the President, and a *fortiori* no review of the facts and the reasoning on which that judgment was based.

Moreover, it does not appear from the proclamation whether the President accepted the reasoning of the Tariff Commission or predicated his approval of the Commission's recommendation upon his own conclusions drawn from the facts set forth in the Commission's report. If the reasoning of the Commission was in fact based on an erroneous interpretation of the statute, the presumption that the President acted properly requires the courts to assume that he followed the latter course. Consequently, the alleged error in the reasoning of the Tariff Commission cannot possibly serve to invalidate the proclamation.

II

The holding of the court below that, under Section 336 (e) (2) (A), if the weighted average of the invoice prices for a representative period is used to determine foreign costs of production, those prices must be converted into terms of dollars at the rate of exchange prevailing during that period, has no warrant in the provisions of the Tariff Act and to a very large extent nullifies the intention of Congress in enacting the flexible tariff provision.

Section 336 contains no mention of conversion of currency. In the absence of express statutory provision it seems clear that in converting foreign costs into dollars the Commission may, as it did in this case, use the rate of exchange prevailing at the time of its investigation, since this rate reflects the then existing differences in costs of

production. If, as held by the court below, the Commission is required to convert foreign costs into dollars at the rate of exchange which prevailed during the period used to ascertain the foreign costs but which, due to subsequent exchange fluctuations, is not the rate prevailing at the time of the investigation, the Commission will be utterly unable to perform its function of determining what change in duty will equalize the differences in costs of production at the time when the change becomes effective. Although the legislative history of Section 336 shows plainly that fluctuating foreign exchange was one of the important factors which Congress considered as creating the need for a flexible tariff law, the decision below renders the provision largely useless for this purpose.

Moreover, even if the construction placed upon Section 336 (e) (2) (A) by the court below is correct, the action of the Commission was still authorized under other provisions of Section 336.

ARGUMENT

I

THE CUSTOMS COURT HAD NO POWER TO REVIEW THE FACTS AND REASONING ON WHICH THE TARIFF COMMISSION BASED ITS RECOMMENDATION TO THE PRESIDENT

Section 336 of the Tariff Act of 1930, *infra*, p. 28, the so-called "flexible tariff" provision, establishes a well-defined procedure whereby the rate of duty prescribed in the Act for any article may be

changed if necessary to equalize the difference in the costs of producing the article in this country and in the principal competing country. Section 336 (a) provides that the Tariff Commission shall institute an investigation to determine the difference in costs of production either upon the request of the President, upon resolution by Congress, upon its own motion, or, in some circumstances, upon the application of an interested party. In the course of the investigation the Commission is to hold hearings, give reasonable public notice thereof, and afford reasonable opportunity for parties interested to be present, produce evidence and to be heard. The Commission is then to report to the President the results of the investigation and its findings; if it finds that the duties fixed by the statute do not equalize the differences in costs of production in this country and in the principal competing country, it is required to specify in its report such increases or decreases in the rates as it finds necessary for this purpose. Section 336 (b) provides that if equalization cannot be accomplished without increasing or decreasing the rates of duty by more than 50%, the Commission shall so state in its report and shall specify the ad valorem rate of duty based on the American selling price of the domestic article as it finds to be necessary for equalization.

Section 336 (c) provides as follows:

> The President shall by proclamation approve the rates of duty and changes in clas-

> sification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

The procedure thus prescribed was fully observed in the present case. The Commission instituted an investigation in response to an application for an increase in duty, it gave public notice of a hearing and, at the hearing, parties interested were given reasonable opportunity to be present, to produce evidence, and to be heard (R. 11). The Commission then submitted a report to the President in which it set forth its findings in detail and stated its conclusion that a 50% increase in the duty fixed by the statute for canned clams would not equalize the difference in the costs of production of the domestic and the foreign article, and that "the rate of duty necessary to equalize such difference within the limits permitted by section 336 (b) of title III of the Tariff Act of 1930 is 35 percent ad valorem based upon the American selling price of the domestic article" (R. 17). In an appendix to its report the Commission set forth a complete summary of the information obtained in its investigation (R. 18–37).

Upon the basis of this report the President issued the proclamation here contested (R. 37–38). In this proclamation the President stated that, in

his judgment, the change in the basis of duty for canned clams recommended by the Commission was shown by the investigation of the Commission to be necessary to equalize the differences in costs of production and the change was therefore approved.

In our view the validity of the proclamation is not subject to attack in the present proceeding. This Court has frequently held that where Congress has empowered a public officer to take some specified legislative action when, in his judgment, such action is necessary to carry out the policy of Congress, the judgment of the officer as to the existence of facts making the action necessary is not subject to judicial review. *United States* v. *Chemical Foundation*, 272 U. S. 1, 14–15; *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163, 184; *Monongahela Bridge* v. *United States*, 216 U. S. 177, 195; *The Philadelphia & Trenton R. R. Co.* v. *Stimpson*, 14 Pet. 448, 458; *Martin* v. *Mott*, 12 Wheat. 19, 30; cf. *Sterling* v. *Constantin*, 287 U. S. 378, 399. To be sure, if Congress "provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that Executive officers *conform their action to the mode prescribed by Congress.*" [Italics supplied.] *Monongahela Bridge* v. *United States, supra*, at 195. But if the procedure established by Congress is observed, the "validity of the reasons stated in the orders, or the basis of fact

on which they rest, will not be reviewed by the courts." *United States* v. *Chemical Foundation, supra,* at 15.

There can be no doubt of the applicability of this rule to the present case, for the decision in *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, establishes, were it not otherwise clear, that the action taken by the Commission and the President was in substance one stage of the legislative process. The Court stated (p. 318):

> No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment *if the prescribed forms of legislation have been regularly observed.* [Italics supplied.]

Here the investigation conducted by the Commission, the hearing which it held after due notice to all interested parties, its report to the President and his proclamation approving the Commission's recommendation, constituted a full and regular observance of the forms prescribed. That being so, under the cases cited there can be no judicial review of the legislative judgment reached by the Commission and the President, and *a fortiori* no review of the facts and the reasoning on which that judgment was based.

This conclusion was reached both by the judge sitting in reappraisement and by the appellate division of the Customs Court. But the court below, two judges dissenting, reversed the judgment of the Customs Court and held in effect that the Customs Court did have jurisdiction to review the facts and reasoning upon which the Commission based its recommendation to the President. The theory of the court was that the statute prohibited the Commission from using a different period for ascertaining the rate of exchange for conversion purposes from the period selected as representative in determining the weighted average of the invoice prices, that because the Commission had used such a different period in violation of the statute its investigation was "illegal," and that, therefore, "the proclamation by the President, based upon such investigation, was without authority of law, illegal, and void" (R. 70).

This holding of the court below fails to observe the essential distinction between administrative orders directed against particular persons, which are subject to judicial impeachment if they are without evidence to support them, and legislative action taken by a public officer pursuant to authority delegated to him, which is not subject to such impeachment if the prescribed forms of legisla-

214865—40——3

tion have been observed. See *Norwegian Nitrogen Products Co.* v. *United States*, *supra*, at 318–319; cf. *Pacific States Co.* v. *White*, 296 U. S. 176, 186. This distinction cannot be obliterated by saying that if the Tariff Commission follows an erroneous method for ascertaining foreign costs of production, its investigation is "illegal" and a necessary jurisdictional prerequisite to the issuance of a proclamation by the President is lacking. Cf. *Adams* v. *Nagle*, 303 U. S. 532, 542. Under the statute, the investigation by the Commission is directed solely to the ascertainment of a fact, *i. e.*, the difference between the costs of production here and abroad. Since, under the decisions above cited, the courts may not review the sufficiency of the facts upon which the Commission based its conclusion, it follows as of course that they may not review the process by which the Commission drew its conclusion from those facts. The Commission's investigation is no less an observance of the prescribed forms of legislation if its conclusion is based on an erroneous application of the facts than if it is based on an erroneous evaluation of the facts. In either event, the Commission's conclusion, being a finding of fact made after due

The opposite conclusion expressed by the court below in *David L. Moss Co., Inc.*, v. *United States*, 103 F. (2d) 395 is, in our view, wrong for the same reason that the decision of that court is wrong in the present case.

notice and hearing, is not subject to impeachment.

The present record well illustrates the error of the court below. The Commission's report sets forth all of the relevant facts. It details the imports of Japanese canned clams for the period from December 1, 1930, to September 30, 1932, conceded by respondent to be representative, the dutiable value of the merchandise in Japanese currency, and the dutiable value of the merchandise converted into United States currency both at the prevailing rate of exchange at the date of export and at the average rate of exchange for the year 1932 (R. 37). No provision of law required it to set forth the reasoning by which it drew its conclusion from these facts; that it did set forth its reasoning, and that that reasoning, in the view of the court below, was based upon an erroneous interpretation of the statute, does not invalidate its investigation or its recommendation, much less the proclamation of the President.

Moreover, it does not appear from the proclamation whether the President accepted the reasoning of the Tariff Commission or predicated his approval of the Commission's recommendation upon his own conclusions drawn from the facts set forth in the Commission's report. If the reasoning of the Tariff Commission was in fact based on an erroneous interpretation of the statute, the presumption that the President acted properly

(*United States* v. *Chemical Foundation, supra; The Philadelphia & Trenton R. R. Co.* v. *Stimpson, supra*) would seem to require the courts to assume that he followed the latter course. In this view of the case, the alleged error in the reasoning of the Tariff Commission cannot possibly serve to invalidate the proclamation.

II

THE TARIFF COMMISSION COMMITTED NO ERROR IN ASCERTAINING THE FOREIGN COSTS OF PRODUCTION

Section 336 (e) prescribes the method by which the Commission is to ascertain the foreign costs of production. It provides as follows:

> * * * In ascertaining under this section the differences in costs of production, the commission shall take into consideration, insofar as it finds it practicable: * * *
>
> (2) IN THE CASE OF A FOREIGN ARTICLE.—
>
> (A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for a representative period * * *;
>
> (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article;
>
> (C) other relevant factors that constitute an advantage or disadvantage in competition,

including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

Pursuant to the provisions of Section 336 (e) (2) (A), the Commission accepted as evidence of the Japanese cost of production the weighted average of the invoice prices, in yen, from December 1, 1930, to September 30, 1932; it then converted these yen prices into dollars at the average rate of exchange for 1932. The court below held that this was a violation of the statute on the sole ground that Section 336 (e) (2) (A) should be construed as though it read, "the commission may accept as evidence of the cost of production of a foreign article the weighted average of the invoice prices or values *in United States currency for a representative period*" [italics of the court] (R. 66). This holding has no warrant in the provisions of the Tariff Act and to a large extent nullifies the intention of Congress in enacting the flexible tariff provision.

1. The purpose of the flexible tariff provision is to permit prompt changes in the amount of duty payable on imported merchandise in order to meet changing conditions of commerce which have made the duty fixed by the statute too high or too low to equalize the difference in the costs of production here and abroad. In making a change of duty

under Section 336, therefore, the purpose must always be to fix a duty which will serve to equalize the differences in costs of production at the time when the change becomes effective.

Section 336 contains no mention of conversion of currency, yet in every investigation undertaken by the Commission, foreign costs, as determined in the foreign currency, must be translated into terms of dollars for purposes of comparison with domestic costs. In the absence of express statutory provision, it seems clear that in converting foreign costs into dollars the Commission may, as it did in this case, use the rate of exchange prevailing at the time of its investigation, since this rate reflects the then existing differences in costs of production. If, as held by the court below, the Commission is required to convert foreign costs into dollars at the rate of exchange which prevailed during the period used to ascertain the foreign costs but which, due to subsequent exchange fluctuations, is not the rate prevailing at the time of the investigation, the Commission will be utterly unable to perform its function of determining what change in duty will equalize the differences in costs of production at the time when the change becomes effective. Although the legislative history of section 336 shows plainly that fluctuating foreign exchange was one of the important factors which Congress considered as creating the need for a

flexible tariff law,[3] the decision below renders the provision largely useless for this purpose.[4]

---

[3] The flexible tariff provision was first introduced in Section 315 of the Tariff Act of 1922 (42 Stat. 858, 941–943). At the time that Act was under consideration, many of the currencies in Europe were falling in exchange value. The ensuing decline in the base on which ad valorem values were computed so greatly reduced the duties that a destructive inundation of European goods was feared. Because of this, the House Committee on Ways and Means, in reporting the bill (H. R. 7456, 67th Cong., 1st Sess.), which was ultimately enacted as the Tariff Act of 1922, provided for the assessment of ad valorem rates of duty on the basis of the American selling prices (H. Rept. 248, 67th Cong., 1st Sess., p. 21). This provision was enacted by the House (61 Cong. Rec. 4198) after its proponents had explained its necessity on the ground, among others, of fluctuating exchange. 61 Cong. Rec. 3477, 3478. When the bill came to the Senate, the Senate Finance Committee reported that the American valuation plan was impracticable of administration and recommended in lieu thereof a flexible tariff provision to accomplish the same purpose. S. Rept. 595, 67th Cong., 2d Sess., pp. 3, 6–7; see also 62 Cong. Rec. 11186, 11189. This change was in line with the recommendation contained in a message of the President to Congress on December 6, 1921, in which he urged the enactment of a flexible tariff policy so that rates might be adjusted to meet unusual and changing conditions. 62 Cong. Rec. 37. The President expressly referred to exchange problems as outstanding in this connection. *Id.* The recommendation of the Finance Committee was adopted by the Senate (62 Cong. Rec. 11627) and the Senate amendment agreed to by the House after conference (62 Cong. Rec. 12718; see also *id.* at 12508). Section 336 of the Tariff Act of 1930 is merely a refinement of Section 315 of the Tariff Act of 1922.

[4] The Tariff Commission informs us that in the case of approximately 35 investigations made by the Commission

The facts of the present case illustrate the point. The need for a change in the duty on canned clams arose largely from the fact that Japan went off the gold standard on December 13, 1931. By June 1932, when the Commission instituted its investigation, the yen had greatly depreciated in terms of United States dollars, thereby greatly increasing the difference, in terms of dollars, between the Japanese and domestic costs of production. In order to determine the Japanese cost of production by use of weighted average invoice prices, the Commission was required to use invoice prices over a period extending for a considerable time before the start of its investigation, when the exchange rate of the yen was substantially higher than it was in 1932. If the Commission were required, as the court below held, to convert the invoice prices into terms of United States currency at the prevailing rate on the date of exportation, the difference between the Japanese costs of production, so determined, and the domestic costs of production would not reflect the depreciation in the value of the yen—one of the important facts necessitating the change in duty. The appropriate way

---

under Section 336, currency fluctuation has been an important element in determining the action recommended. Increases in duty have been proclaimed on 13 articles when the currency of the principal competing country was below par in terms of United States dollars. In the case of 8 of these 13 articles, Japan was the principal competing country and in each instance the increase was found necessary after Japan went off the gold standard.

for the Commission to determine the difference in the costs of production at the time of its investigation was by means of the method actually used—i. e., to determine the Japanese costs of production in yen over a representative period and then to convert those costs into dollars at the average rate of exchange prevailing at the time of the investigation.

There is nothing arbitrary in this method of ascertaining costs. Depreciation of the currency of a country in terms of foreign exchange has, at least over limited periods of time, a relatively small influence upon the domestic value of that currency and upon the domestic costs of production, expressed in terms of that currency. League of Nations World Economic Survey, 1932–1933, pp. 41–42; Harris, *Exchange Depreciation* (1936) p. 474; Edie, *Dollars*, pp. 94–95. Thus the Commission was fairly entitled to assume that, despite the fact that Japan went off the gold standard on December 13, 1931, the weighted average of the invoice prices of Japanese canned clams for the 22-month period which it took as representative accurately reflected the Japanese cost of production, in yen, at the time of its investigation.[5] But in order to determine the difference in costs of production, in dollars, at the time of its investigation,

[5] The record shows that the invoice prices of the Japanese article, in yen, were in some instances lower in 1932 than in 1931, although Japan went off the gold standard on December 31, 1931 (R. 28).

it was required to convert the yen costs into dollars at the average rate of exchange then prevailing. Had it made the conversion at the rate prevailing during the 22-month period of importation, it would have been using a rate which had merely an historical interest and which did not represent conditions as they actually existed at the time that action under the flexible tariff provision was being considered.

The construction placed on Section 336 (e) (2) (A) by the court below prevents the Commission and the President from making such prompt modifications of tariff duties as are necessary to offset changes in the value of foreign currencies. In a case where the value of the currency of a given country has undergone a sudden and material change, an investigation in which the old rate of exchange is applied as the conversion factor would in most cases show little or no need for equalization, even though the depreciation of the foreign currency quite obviously made equalization highly necessary. The foreign article would therefore enjoy an advantage in competition with the domestic article which the Commission and the President would be powerless to prevent until another investigation could be made. And, even then, a further fluctuation of the foreign currency might produce a similar result at the end of the later investigation. Thus, under the decision of the court below, the Commission and the President are effectively prevented from carrying out the purpose of

the flexible tariff provision in almost every case where currency fluctuation is a major factor.

It is plain, therefore, that the interpretation of Section 336 (e) (2) (A) adopted by the court below does not correctly reflect the intention of Congress. The method adopted by the Commission to determine the Japanese costs of production, on the other hand, is entirely consonant with the provisions of this section and manifestly carries out the Congressional purpose.

2. Even if the construction which the court below placed on Section 336 (e) (2) (A) were correct, the Commission's investigation would still not be "illegal." The provision of Section 336 (e) (2) (A) for use of the weighted average of invoice prices or values for a representative period is permissive in character; the Commission "may" accept such an average as "evidence" of the foreign costs of production "in so far as it finds it practicable." Since the provision is permissive, there is no warrant for holding that the Commission's investigation was in violation of the statute because the Commission refused to accept as evidence the weighted average of invoice prices converted into United States currency at the rate of exchange prevailing on the dates of exportation during the representative period. The Commission, having found that it was not practicable to use this method of conversion (R. 14), was under no statutory compulsion to do so. Moreover, the further provision of Section 336 (e) that the Commission may, in

its discretion, consider "other relevant factors that constitute an advantage or disadvantage in competition" plainly authorized the Commission to take into consideration the decline in the value of the yen after the period selected as representative for determining the weighted average of the invoice prices. It needs no argument to demonstrate that a decline in the value of Japanese currency in terms of the dollar is a factor which gives a Japanese producer a competitive advantage in the United States over a domestic producer.

The error of the Commission, if error there was, reduces itself therefore to the fact that in its report to the President (R. 15) the Commission relied on an allegedly improper interpretation of Section 336 (e) (2) (A) as the source of its authority for action which was plainly within its powers under Section 336 considered in its entirety. Such an error obviously furnishes no basis for judicial impeachment of a Presidential proclamation.*

* In its brief in opposition to the petition for certiorari, respondent suggests that if the procedure followed by the Commission and the President was in compliance with the statute, the statute is an unconstitutional delegation of legislative power (Br. pp. 4–5, 10). This contention seems foreclosed by the decision of this Court in *Hampton & Co. v. United States*, 276 U. S. 394, which upheld the flexible provision of the Tariff Act of 1922 which was broader in scope than Section 336 of the 1930 Act. Consequently, we do not discuss the question in this brief.

CONCLUSION

It is respectfully submitted that the decision below should be reversed.

FRANCIS BIDDLE,
Solicitor General.
WEBSTER J. OLIVER,
Assistant Attorney General.
CHARLES D. LAWRENCE,
Special Assistant to the Attorney General.
RICHARD H. DEMUTH,
Special Attorney.
JOSEPH F. DONOHUE,
JOHN R BENNEY,
Attorneys.

EDWIN G. MARTIN,
General Counsel,
United States Tariff Commission.

MARCH 1940.

APPENDIX

Tariff Act of 1930, c. 497, 46 Stat. 590 (U. S. C., Title 19, Sec. 1336):

SEC. 336. EQUALIZATION OF COSTS OF PRODUCTION.

(a) CHANGE OF CLASSIFICATION OR DUTIES.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign

article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

(b) CHANGE TO AMERICAN SELLING PRICE.—If the commission finds upon any such investigation that such differences cannot be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

(c) PROCLAMATION BY THE PRESIDENT.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

(d) EFFECTIVE DATE OF RATES AND CHANGES.—Commencing thirty days after the date of any presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in

basis of value specified in the report of the commission shall take effect.

(e) ASCERTAINMENT OF DIFFERENCES IN COSTS OF PRODUCTION.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, insofar as it finds it practicable:

(1) IN THE CASE OF A DOMESTIC ARTICLE.—(A) The cost of production as hereinafter in this section defined; (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

(2) IN THE CASE OF A FOREIGN ARTICLE.—(A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for a representative period and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets; (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

(f) MODIFICATION OF CHANGES IN DUTY.—Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes.

(g) PROHIBITION AGAINST TRANSFERS FROM THE FREE LIST TO THE DUTIABLE LIST OR FROM THE DUTIABLE LIST TO THE FREE LIST.—Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, or in any amendatory Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(h) DEFINITIONS.—For the purpose of this section—

(1) The term "domestic article" means an article wholly or in part the growth or product of the United States; and the term "foreign article" means an article wholly or in part the growth or product of a foreign country.

(2) The term "United States" includes the several States and Territories and the District of Columbia.

(3) The term "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision or subdivi-

sions thereof (other than the United States and its possessions).

(4) The term "cost of production", when applied with respect to either a domestic article or a foreign article, includes, for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in its production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

(i) RULES AND REGULATIONS OF PRESIDENT.—The President is authorized to make all needful rules and regulations for carrying out his functions under the provisions of this section.

(j) RULES AND REGULATIONS OF SECRETARY OF TREASURY.—The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of foreign articles of the class or kind of articles with respect to which a change in basis of value has been made under the provisions of subdivision (b) of this section, and for the form of invoice required at time of entry.

(k) INVESTIGATIONS PRIOR TO ENACTMENT OF ACT.—All uncompleted investigations instituted prior to the approval of this Act

under the provisions of section 315 of the Tariff Act of 1922, including investigations in which the President has not proclaimed changes in classification or in basis of value or increases or decreases in rates of duty, shall be dismissed without prejudice; but the information and evidence secured by the commission in any such investigation may be given due consideration in any investigation instituted under the provisions of this section.

* * * * *

SEC. 402. VALUE.

* * * * *

(d) EXPORT VALUE.—The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * *

(g) AMERICAN SELLING PRICE.—The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale to all purchasers in

the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.

U. S. GOVERNMENT PRINTING OFFICE 1940

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 613

THE UNITED STATES, *Petitioner*

v.

GEO. S. BUSH & CO., INC., *Respondent*

On petition for writ of certiorari to the United States Court of Customs and Patent Appeals.

Brief for Respondent in Opposition

GEORGE R. TUTTLE
500 Sansome Street
San Francisco, Calif.
Attorney for Respondent

Subject Index

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Errors Specified	5
Reasons for Denial of Writ	8
Conclusion	15
Appendix—	
Sec. 336. Equalization of Costs of Production	i
Sec. 402 Value	v
Sec. 522. Conversion of Currency	vi

Citations

	Pages
Baltimore & Ohio v. United States, 264 US 258, 264	11
Baltimore & Ohio, United States v., 293 US 454, 462	10
Hamilton-Brown Shoe Co. v. Wolf, 240 US 251, 258	11
Hampton v. United States, 276 US 394, 409	10
Magnum Import Co. v. De Spoturno Coty, 262 US 159, 163	11
Moss v. United States, 26 CCPA (Customs) 381, 103 F (2) 395	5, 6
Muser v. Magone, 155 US 240, 247	10
Norwegian Nitrogen Co. v. United States, 288 US 294, 305	12
Passavant, United States v., 169 US 16, 21	10
Robertson v. Frank, 132 US 17, 24	10
St. Joseph Stockyards Co. v. United States, 298 US 38, 51	11
United States v. Baltimore & Ohio, 293 US 454, 462	10
United States v. Passavant, 169 US 16, 21	10
Waite v. Macy, 246 US 606	11
Statutes:	
Tariff Act of 1930, c. 497, 46 Stat. 590:	
Sec. 336, 46 Stat. 701	3, 4, 7, 9, 14, App. i
Sec. 402 (d) and (g), 46 Stat. 708	3, App. v
Sec. 522 (b), 46 Stat. 739	3, App. vi
Tariff Act of 1922, sec. 315, 42 Stat. 941	14
Judicial Code:	
Sec. 195	2, 11
Sec. 240	11
Miscellaneous:	
62 Cong. Rec., part 12, p. 12508	14
62 Cong. Rec. 37	13
62 Cong. Rec., part 2, p. 11160	14
Senate Report 595, 67th Cong., 2d session	14
House Rep. 248, 67th Cong., 1st session	14

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 613

THE UNITED STATES, *Petitioner*

v.

GEO. S. BUSH & CO., INC., *Respondent*

On petition for writ of certiorari to the United States Court of Customs and Patent Appeals.

Brief for Respondent in Opposition

OPINIONS BELOW

This action originated by a trial in the United States Customs Court before a single judge, whose opinion (R. 51-60) is reported as Reap. Dec. 4034, 71 Treas. Dec. 1291. Thereafter a review was granted by a division consisting of three judges of said court, whose opinion (R. 63-75) is reported as Reap. Dec. 4253, 73 Treas. Dec. 1432. An appeal involving only questions of law was taken to the

United States Court of Customs and Patent Appeals, and that court's opinions (R. 77-92) are reported as CAD 64, 27 CCPA....., 104 F (2d) 368.

JURISDICTION

The petition is authorized by section 195 of the Judicial Code, as amended (28 USC 308), granting to this court the power to review, by certiorari or otherwise, final judgments of the Court of Customs and Patent Appeals.

QUESTIONS PRESENTED

The court below held that a proclamation by the President changing the basis of assessment of duty on imported canned clams was invalid because based upon an illegal investigation made by the United States Tariff Commission (R. 86). Therefore respondent cannot accede to the government's statement (p. 2) that the first question presented is whether:

> The Customs Court has power to review the facts upon which the Tariff Commission based its recommendations to the President, and if dissatisfied to declare the proclamation void.

As will be shown below, the court did not "review the facts" and declare the proclamation void because dissatisfied therewith, but simply determineed that a legal investigation had not been made, and that this was a condition precedent to the issuance of a valid proclamation.

The second question stated by petitioner (p. 2) is whether the Tariff Commission erred in its method of ascertaining the foreign cost of production of canned clams. As to this respondent contended, and the court

below held (R. 82, last par.), that "the Commission did not find the weighted average of the invoice prices or values *for a representative* period," and (R. 83) that "The formula used by the Commission was not that provided by the Congress, * * *" Also, the court pointed out (R. 82, 2nd par.) that Congress provided by section 336 (e) (2) (A), that the Commission might accept as evidence of the cost of production the "weighted average of the invoice prices or values for a representative period."

STATUTES INVOLVED

The relevant statutes are sections 336, 402 (d), 402 (g), and 522 (b), tariff act of 1930, c. 497, 46 Stat. 696, 708, 739, 19 USC 1336, 1402, 31 USC 372, as set forth in the appendix, infra, pp. i-vi.

STATEMENT

So far as it is material for present purposes, petitioner's statement of facts is accurate, except for the following reference to respondent's position and contentions (p. 5):

> It was admitted that the Commission had proceeded properly in ascertaining the foreign and domestic costs and that the period selected as representative for determining the weighted average of invoice prices was proper. The validity of the proclamation was challenged solely on the ground that the Commission had no legal authority to use one period to ascertain the weighted average of invoice prices in Japanese yen and another period to ascertain the rate of exchange for converting the yen into United States dollars.

The statement that respondent admitted that the Commission "proceeded properly in ascertaining foreign . . . costs" is true only if the ascertainment relates solely to costs *as expressed in foreign money*. This was not contested. Therefore a more correct statement of respondent's position is that the Commission's ascertainment, by use of the weighted average of invoice prices or values, of foreign cost of production, as expressed in *foreign* money, was not challenged, and no claim was made that the period selected was not representative. At all times, however, respondent contended that the Commission had not ascertained foreign cost of production, in that the Commission's finding, as expressed in United States currency, was not the cost of production referred to in the statute.

In the court below, and in the present petition, the government asserted that a finding by the Commission of a foreign cost of production, expressed in foreign currency, is a compliance with the terms of section 336 (e) (2) (A), and that thereafter the Commission might convert this cost into United States currency by use of a rate of exchange other than the rates in effect during the representative period. These opposite contentions constituted the main issue below, and it was upon this point that the court held that the Commission's investigation was illegal.

As quoted above, petitioner also states that the validity of the proclamation was challenged solely on one ground. However, the decision below states (R. 81) that "the validity of the presidential proclamation is also challenged by counsel for appellant for other reasons," which the court found unnecessary to be set forth. Also, as mentioned by the opinion, appellant contended (R. 81) that:

> If the procedure followed by the Commission and the President is not in violation of the terms of sec-

tion 336, then the statute is an unconstitutional delegation of legislative power in that it grants to the agent discretion as to what the law shall be.

The court below agreed with this contention in principle (R. 84), but in view of its decision did not specifically pass upon this point.

ERRORS SPECIFIED

1) Under this heading (p. 6) petitioner states that the court below erred in failing to hold that the Customs Court had no power to review the facts or the reasoning upon which the Tariff Commission based its recommendation to the President.

This is answered by pointing out that the court did not review the "facts or the reasoning," but merely passed upon three points, namely:

a) Whether a legal investigation by the Commission was a condition precedent to issuance of a lawful proclamation.

b) Whether ascertainment, in terms of United States currency, of foreign cost of production for the period selected as representative was a necessary part of its investigation.

c) Whether the Commission did in fact ascertain such cost of production.

In addition to its opinion in the instant case, the court's recent decision in *Moss v. United States*, 26 CCPA (Customs) 381, 103 F (2d) 395, shows that it has not asserted power to review the Commission's actions in the manner stated by petitioner. There it was said by Judge Parker

of the fourth circuit, specially assigned, Judge Lenroot concurring (p. 384-5):

> It is clear, therefore, that an investigation must be conducted and a hearing had by the Commission as a basis for action under the act; and, if such evidence is not taken, action is not authorized. St. Joseph Stockyards Co. v. United States, 298 U. S. 381, 51.
>
> . . .
>
> *This does not mean that the court may review the facts or substitute its judgment for that of the Commission.* It means merely that, where the question is properly raised, it must determine whether the Commission acted within the scope of the authority granted it by Congress, and that in determining this question it must consider whether the Commission had before it any substantial evidence upon which to base its action.

In the present case the majority opinion was written by Judge Hatfield, and a reference to his concurring opinion in the *Moss* case, *supra*, again illustrates that the court does not consider it has power in cases such as this to review the facts and reasoning upon which the Commission bases its recommendation to the President. In Judge Hatfield's opinion (p. 392) the court does not have jurisdiction "to review the evidence before the President for the purpose of determining whether there was any substantial evidence to warrant the raising or lowering of rates of duty," but at the same time he states (p. 392), in what is pertinent to the present question, that the court has power "to require the Tariff Commission and the President to conform their actions to the mode prescribed by Congress."

Thus it seems clear that here the court merely inquired as to whether the Commission had followed the procedure outlined by Congress for determining foreign cost of production for a representative period, and, when it ap-

peared that this had not been done, held that the proclamation was void for want of a legal investigation.

2) Petitioner's second specification of error (p. 6) is in effect that the court erred in holding that section 336 (e) (2) (A) prohibited ascertainment of cost of production in the manner here used. The method employed by the Commission was concisely described by the court (R. 82-3). If this method were valid, then we would have the strange result set forth as follows by the court (R. 84):

> It is clear, therefore, that if the Commission has authority to do what it did in the instant case, it has authority to find *on the same facts* at least three entirely different costs of production for the foreign article, and, instead of recommending to the President a rate of duty based upon findings of fact, could recommend a rate of duty in accordance with its own economic theories.

3) Petitioner's third specification of error refers to a holding which is incidental to that complained of in the second specification. Both points are answered by reference to the statute, which clearly shows that Congress intended that the Commission should ascertain foreign and domestic costs of production for the same representative period, and compare these costs to determine whether the existing duties were adequate. Obviously, for purposes of the statute, these costs must necessarily be found in United States currency. Furthermore, if conversion of foreign currency may be made at a rate of exchange other than that existing during the period selected as representative, the converted values cease to be the values for that period.

4) Errors 4 and 5 referred to by petitioner (pp. 6-7) are that the court erred in holding the investigation and proclamation illegal, and in holding that conversion of

currency is involved in finding basic cost of production. As these two points are taken up elsewhere, they will not be separately discussed here.

REASONS FOR DENIAL OF WRIT

Petitioner states under "Reason for granting the writ" (p. 7):

> The question decided by the Court of Customs and Patent Appeals is one of first impression. Although there is, therefore, no conflict of decisions, the decision below, if allowed to stand, will in large measure destroy the usefulness of the flexible-tariff provisions of the tariff act of 1930 by prohibiting prompt and effective changes in tariff duties to offset changing trade conditions caused by foreign-currency fluctuations. The question cannot well arise in courts other than the Customs Courts. *Consequently there is involved a question of federal law of large public importance which has not been, but should be, settled by this court.*

In other words (a) under the decision in question the purposes of the flexible-tariff law would be largely defeated, because it would no longer be possible for the Tariff Commission to act promptly and effectively "to offset changing trade conditions caused by foreign-currency fluctuations," and (b) there is therefore "involved a question of federal law of large importance."

We respectfully dissent. The statement quoted is one of unwarranted apprehension rather than of factual certainty. The Commission can act just as promptly and effectively when it finds cost of production for the representative period in American dollars as when it finds it in foreign currency. The power of the Commission to act

in the light of these "changing trade conditions" will in no way be impaired by the principle of the decision in question. Therefore, that decision cannot "in large measure destroy the usefulness of the flexible-tariff provisions of the tariff law."

Further in regard to the asserted "question of law of large importance," a case may be important because it involves a large sum of money. That does not apply here, because only a single commodity (clams) from a single country is in question. Also, a case may be important because it turns on a legal principle of wide applicability. In this instance this applicability is alleged to be to "changing trade conditions caused by foreign-currency fluctuations." Foreign-currency fluctuation has existed throughout the world since the tariff act of 1930 was enacted and yet petitioner does not even assert that the present decision would in any manner impair the validity of proclamations covering the many other commodities which the Commission has investigated. The statement that the case "is one of *first* impression" implies that this is the first time the question has arisen. So, we emphatically deny that the matter is of large importance, either in its immediate results or in its possible effect upon future activities of the Commission.

Further in respect to the "question of Federal law," two main points were involved.

1) Could the acts of the Commission be reviewed to determine whether they had conducted an investigation as provided for by section 336, and (2) is compliance by the Commission with the terms of section 336 a condition precedent to issuance of a valid proclamation?

In regard to these questions it should be noted that the President may not proclaim any change in rate of duty except that "specified in any report of the Commission

under this section" (336-c), and that the Commission is required to report to the President "the results of its investigation and its findings in respect to such differences in costs of production," and to "specify in its report such increases or decreases in rates of duty expressly fixed by statute . . . as it *finds shown by the investigation* to be necessary to equalize such differences" (sec. 336-a). Clearly, then, Congress required a determination *by the Commission* of the differences in the cost of producing the foreign and domestic article *during the representative period*. Consequently, such a determination is prerequisite to a valid proclamation. If this is not true, then Congress did not "lay down by legislative act an intelligible principle to which the person or body is directed to conform," such as was referred to in *Hampton v. United States*, 276 US 394; 409, involving the so-called "flexible tariff" provision of the tariff act of 1922.

Therefore, the two questions set forth above were properly passed on by the court, and there is not here "involved a question of federal law . . . which has not been, but should be, settled by this court." Similar questions, as applies to varied circumstances have been settled by this court in many cases, including the following:

a) *Robertson v. Frank*, 132 US 17, 24; *Muser v. Magone*, 155 US 240, 247; *United States v. Passavant*, 169 US 16, 21, holding that, although appraisement of imported merchandise was generally conclusive, yet, if the appraiser proceeded upon a wrong principle, contrary to law, his appraisement was subject to impeachment.

b) *United States v. Baltimore & Ohio*, 293 US 454, 462, holding an order of the Interstate Commerce Commission to be void because of absence of any basic or essential finding required to support the Commission's order.

c) *Baltimore & Ohio v. United States,* 264 US 258, 264, holding that an order of the Interstate Commerce Commission made without evidence to support it was void.

d) *Waite v. Macy,* 246 US 606, involving an action to enjoin the Tea Board from applying certain tests to imported tea wherein it was said (p. 608-9):

> No doubt it is true that this court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality, or fitness for consumption. Morrill v. Jones, 106 US 466; United States v. United Verde Copper Co., 196 US 207, 215, United States v. George, 228 US 14, 21.

e) *St. Joseph Stockyards Co. v. United States,* 298 US 38, 51, holding that the court may ascertain whether there is any evidence to support a finding by a commission acting within the sphere of legislative authority.

Jurisdiction to grant certiorari here is derived from section 195 of the Judicial Code as amended (28 USC 308). This section is substantially the same as that authorizing certiorari to circuit courts of appeals prior to 1925. Judicial Code, section 240. Therefore, the statement in *Magnum Import Co. v. De Spoturno Coty,* 262 US 159, 163, that jurisdiction to grant certiorari was not conferred upon this court "merely to give the defeated party in the circuit court of appeals another hearing" is applicable. Also, as stated in *Hamilton-Brown Shoe Co. v. Wolf,* 240 US 251, 258, in reference to certiorari:

> As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.

Petitioner cites *Norwegian Nitrogen Co. v. United States*, 288 US 294, 305, as authority for its contention (p. 9) that "there can be no judicial review of the legislative judgment reached by the Commission and the President, and *a fortiori* no review of the facts and reasoning on which that judgment was based." As has been shown above the court below did not pretend to review such facts, but only determined whether, in the words of the cited case, "the prescribed forms of legislation have been regularly observed." The applicable principle of that case to the present law is that although the action of the Tariff Commission, in exercising its delegated power of ascertaining a rate of duty necessary to equalize differences in cost of production, is not subject to impeachment, yet this is true only if the prescribed forms of legislation have been regularly observed. Here the Commission did not ascertain a rate of duty necessary to equalize differences in costs of production existing during the representative period. Therefore the "prescribed form" was not regularly observed.

As part of the argument justifying the Commission's actions petitioner asserts (p. 10) that:

> The need for a change in the duty on canned clams arose primarily from the fact that Japan went off the gold standard on December 13, 1931.

However, it should be noted that the investigation also related to razor clams, as to which "Canada is the principal competing country" (R. 22). Furthermore, although many articles were being imported from Japan at this time, and hence there would "primarily" have been a similar need for change in duty, yet so far as appears from the petition no such changes were made.

In support of the petition it is argued (p. 11) that:

> Depreciation of the currency of a country in terms of foreign exchange has, at least over limited periods

of time, a relatively small influence upon the domestic value of that currency and upon the domestic cost of production, expressed in terms of that currency. See e. g. Edie, *Dollars*, pp. 94-5.

Assuming that this is so, yet it remains true that use of an average rate of exchange to convert such costs into United States currency does not result in a "weighted average" of prices or values such as the Commission is directed by section 336 (e). (2) to ascertain. This is illustrated by reference to a supposed importation of 50,000 cases of merchandise over a 5-month period, at unit prices of 10 yen per case, and with an exchange rate ranging from 40 cents to 20 cents, with an *average* of 30 cents. Under such facts conversion at the *average* rate would give a total dollar value of $150,000 or $3 per case. However if the monthly quantity of importations varied during this period, use of the actual rates of exchange would produce a unit value of $3.25, as follows:

	Cases	Invoice unit price	Total invoice value	Exchange rate	Dollar value
1st month	20,000	10 yen	200,000	.40	80,000
2nd month	10,000	10 yen	100,000	.35	35,000
3rd month	5,000	10 yen	50,000	.30	15,000
4th month	5,000	10 yen	50,000	.25	12,500
5th month	10,000	10 yen	100,000	.20	20,000
					162,500

Average value per case, $3.25.

At page 10 petitioner cites the Congressional record and House and Senate reports relating to the tariff act of 1922 as showing the purpose of the flexible-tariff provision. 62 Cong. Rec. 37 contains an address to Congress by the President on December 6, 1921, requesting an extension of the powers of the Tariff Commission, "so that it can adapt itself to scientific and wholly just adminis-

tration of the law." 62 Cong. Rec., part 12, p. 12508, is a report by Mr. Fordney on the then pending tariff act, arguing for adoption of a change in the basis of assessment of duty from "foreign valuation to the American-wholesale selling price of the imported goods." House report 248 likewise endorses the American valuation basis of assessment and Senate report 595 pertains to the same subject.

So, these proceedings in Congress all related to the tariff act of 1922, and consequently are not of importance in the present case, particularly because the provision in section 336 permitting the Commission to accept, as evidence of foreign cost of production, the weighted average of the invoice price or values for a representative period, was newly enacted in 1930.

There is, however, in 62 Cong. Rec., part 2, page 11160, a statement which is of interest in respect to one point raised by the petitioner. Senator McCumber, chairman of the Senate Finance Committee, in discussing the flexible-tariff provision, 42 Stat. 941, section 315 of the tariff act of 1922, and in answering a specific question as to whether the President's action thereunder was subject to review, said:

> We can not keep out of court the question as to whether or not the President has violated the law. That can be brought before the court in a proper proceeding.

In supporting the constitutionality of that section, Senator McCumber also said (p. 11177):

> That situation develops a question of law. While the contrary view has been asserted, the opinion is hazarded that such failure of the President to follow *or his misinterpretation of a law entering into his conclusion* would, in a proper case made, be subject to judicial cognizance. If that is true no express au-

thority therefor need be written in the amendment, *but the question could and would be raised on protest as now provided before the Board of United States General Appraisers* (now Customs Court).

The function of finding costs of production and ascertainment of a rate of duty necessary to equalize any differences is now performed by the Tariff Commission rather than by the President. Consequently, their misinterpretation of the law entering into their conclusions should likewise be subject to judicial cognizance by the Customs Court.

CONCLUSION

For reasons stated above it is respectfully submitted that the petition for certiorari should be denied.

San Francisco, January 22, 1940.

GEORGE R. TUTTLE
Attorney for Respondent

(APPENDIX FOLLOWS)

APPENDIX

Sec. 336. Equalization of Costs of Production.

(a) Change of Classification or Duties.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

(b) Change to American Selling Price.—If the commission finds upon any such investigation that such differences can not be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

(c) Proclamation by the President.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

(d) Effective Date of Rates and Changes.—Commencing thirty days after the date of any presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in basis of value specified in the report of the commission shall take effect.

(e) Ascertainment of Differences in Costs of Production.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, in so far as it finds it practicable:

(1) In the Case of a Domestic Article. (A) The cost of production as hereinafter in this section defined; (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

(2) In the Case of a Foreign Article. (A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for a representative period and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets); (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

(f) Modification of Changes in Duty.—Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes.

(g) Prohibition Against Transfers from the Free List to the Dutiable List or from the Dutiable List to the Free List.—Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, or in any amendatory Act, that the duty or duties shall not exceed a specified

ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such article shall exceed the maximum ad valorem rate so specified.

(h) Definitions.—For the purpose of this section:

(1) The term "domestic article" means an article wholly or in part the growth or product of the United States; and the term "foreign article" means an article wholly or in part the growth or product of a foreign country.

(2) The term "United States" includes the several States and Territories and the District of Columbia.

(3) The term "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions).

(4) The term "cost of production," when applied with respect to either a domestic article or a foreign article, includes, for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in its production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

(i) Rules and Regulations of President.—The President is authorized to make all needful rules and regulations for carrying out his functions under the provisions of this section.

(j) Rules and Regulations of Secretary of Treasury.—The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of foreign articles of the class or kind of articles with respect to which a change in basis of value has been made under the provisions of subdivision (b) of this section, and for the form of invoice required at time of entry.

(k) Investigations Prior to Enactment of Act.—All uncompleted investigations instituted prior to the approval of this Act under the provisions of section 315 of the Tariff Act of 1922, including investigations in which the President has not proclaimed changes in classification or in basis of value or increases or decreases in rates of duty, shall be dismissed without prejudice; but the information and evidence secured by the commission in any such investigation may be given due consideration in any investigation instituted under the provisions of this section.

Sec. 402. Value.

(d) Export Value.—The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

(g) AMERICAN SELLING PRICE.—The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.

Sec. 522. Conversion of Currency.

(b) Proclaimed Value Basis of Conversion.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of enactment of this act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

FILE COPY

Office - Supreme Court, U. S.
No. 613
APR 16 1940
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

October Term, 1939

No. 613

THE UNITED STATES OF AMERICA, *Petitioner*

v.

GEORGE S. BUSH & CO., INC., *Respondent*

BRIEF FOR RESPONDENT

FRANK L. LAWRENCE
GEORGE R. TUTTLE
Attorneys for Appellee

Table of Contents

		Page
I)	In general	1
II)	The basic statute and its salient points	4
III)	Respondent's contentions	6
IV)	Petitioner's contentions	8
V)	The court's power to review	8
VI)	Legal investigation	14
VII)	Distinction between tariff acts of 1922 and 1930	17
VIII)	Related statutes	20
IX)	Prerequisites of a valid investigation	24
X)	Averages for representative period, and false currency conversion	26
XI)	Method used in computing cost of production	31
XII)	Other relevant factors	40
XIII)	Legislative history	41
XIV)	Effect of petitioner's contention on validity of section 336	48
XV)	Points in petitioner's brief not previously answered	52
XVI)	Conclusion	65

APPENDIX

A	Extracts from tariff act of June 17, 1930, c. 497, 46 Stat. 590, 19 USC 1336	i
B	Extract from tariff act of September 21, 1922, C. 356, 42 Stat. 858, 922, 19 USC 121, 154	viii
C	Reports to the President by the United States Tariff Commission under section 336, tariff act of 1930, second series	xiii

Table of Cases

Pages

Adams v. Nagle, 303 US 532, 542 56
Akawa v. United States, 23 CCPA 75, 80 ..... 5, 18

Best, United States v., 24 CCPA 220 ..... 60, 63

Chemical Foundation, United States v., 272 US 1, 14, 15 ..... 53, 54
Cincinnati v. Clinton County, 1 Ohio State 88 49

Dakota Central Tel. Co. v. South Dakota, 250 US 163, 184 ..... 53, 54

Felter Corp. v. Dutchess Hat Works, 21 CCPA 463, 476 ..... 5, 19, 20, 23, 27, 33
Field v. Clark, 143 US 649, 683 49
Foster v. United States, 20 CCPA 15, 23 ..... 11, 14, 17, 20
Fox River Butter Co. v. United States, 20 CCPA 38, 45 ..... 12, 16, 17

Hampton v. United States, 276 US 394, 409 ..... 8, 11, 17, 49, 50
Hampton v. United States, 14 CCPA 350, 369 ..... 12, 17

Interstate Commerce Commission v. Goodrich Transit Co., 224 US 194, 214 49

Leon, United States v., 20 CCPA 49, 53 33

Martin v. Mott, 12 Wheat. 19, 30 ..... 53, 55
Monongahela Bridge v. United States, 216 US 177, 195 ..... 53, 54
Moss v. United States, 26 CCPA 381, 385, 103 F. (2d) 395 ..... 11, 12, 16, 19
Muser v. Magone, 155 US 240, 247 9
Mutual Film Corp. v. Industrial Commission, 236 US 230 49

Norwegian Nitrogen Products Co. v. United States, 288 US 294 ..... 9, 16, 17, 19, 21, 46
Norwegian Nitrogen Products Co. v. United States, 20 CCPA 27, 34-5, T. D. 45674 15

Pages

Pacific States Box Co. v. White, 296 US 176, 186 56
Passavant, United States v., 169 US 16, 21 9
Panama Refining Co. v. Ryan, 293 US 388; 79 L. ed. p. 488 ..... 49, 51
Philadelphia & Trenton Railroad Co. v. Stimson, 14 Pet. 448, 458 ..... 53, 55

Robertson v. Frank, 132 US 17, 24 9
Rock Royal Co., United States v., 307 US 533, 574 49

St. Louis Merchants Bridge Terminal Railway Co. v. United States, 188 F. 191, 195 49
Sears, Roebuck & Co., United States v., 20 CCPA 295, 301 12
Sterling v. Constantin, 287 US 378, 399 ..... 53, 55

Waite v. Macy, 246 US 606 9
Wichita Railroad & Light Co. v. Public Utilities Commission, 260 US 48 51

Zeiss v. United States, 23 CCPA 7, 14 ..... 5, 15, 24

STATUTES

Tariff act of September 21, 1922, c. 356, 42 Stat. 858 ..... app. viii
Sec. 315, 19 USC 154:6 ..... 5, 8, 11, 17, 44-5, app. viii
Tariff act of June 17, 1930, c. 497, 46 Stat. 590 ..... 1, app. i
Sec. 336, 19 USC 1336 ..... 4, 8, 11, 17, 28, 31, 32, 36, 39, 41, 45, 48, 50, 64, app. i
Sec. 402 (e), 19 USC 1402 ..... 20, 21, 23, app. v
Sec. 402 (g), 19 USC 1402 ..... 7, 18, 20, 22, 24, 25
Sec. 484, 19 USC 1484 ..... 23, app. vii
Sec. 481, 19 USC 1481 ..... 23, app. vi
Sec. 485, 19 USC 1485 ..... 24, app. vii
Sec. 501, 19 USC 1501 2
Sec. 522, 31 USC 372 ..... 20, 22, app. viii

Pages

MISCELLANEOUS

Congressional Record:
62 Cong. 11186 42
62 Cong. 11189 ..... 42, 43
67 Cong., 2d sess., Sen. rept. 591, p. 3 42
71 Cong., 1st sess., p. 160 45
72 Cong., 1st sess., pp. 2930, 2971, 3156, 3293, 8752 48
72 Cong., 2d sess., pp. 718, 2555, 2640 48
72 Cong., 2d sess., 11185 43

Hearings by Committee on Ways and Means:
Tariff Readjustment, 1929, p. 10657 44
Tariff Readjustment, 1929, p. 10660 44
Tariff Readjustment, 1929, p. 10662 44
Equalization of Tariff Duties, etc., pp. 1, 2, 7, 9-10 46
Reports of Tariff Commission to President ..... app. xiii

In the Supreme Court of the United States

October Term, 1939

No. 613

THE UNITED STATES OF AMERICA, *Petitioner*

v.

GEORGE S. BUSH & CO., INC., *Respondent*

BRIEF FOR RESPONDENT

I) **In general:** This case relates to canned clams imported from Japan and entered for customs purposes at the port of Seattle on April 6, 1936 (R. 4). The tariff act of June 17, 1930, c. 497, sec. 1, 19 USC 1001, par. 721 (d), provides for "clams . . . packed in air-tight containers, 35 percent ad valorem." Normally this ad valorem duty would be applicable to the provision in section 402 (a) of said act, 19 USC 1402 (a), that:

> For the purposes of this Act the value of imported merchandise shall be—
>
> (1) The foreign value or the export value, whichever is higher.

But under the flexible-tariff law contained in section 336 of said act (appendix, i), and in conformity with a proclamation by the President (R. 37), these clams were appraised on the much higher basis of the American selling price of domestic canned clams in the principal market of the United States in accordance with section 402 (g) of said act (appendix, vi).

On successive appeals (R. 3, 47) by respondent-importer, aforesaid appraisal at the American selling price was affirmed by a single judge of the Customs Court (R. 39-47) and by the second division of that court (R. 48-59), those proceedings being under section 501 of said tariff act, 19 USC 1501. On appeal to the Court of Customs and Patent Appeals (R. 1) the decision of the Customs Court was reversed (R. 61-79).

At the trial in the Customs Court (R. 5) it was stipulated (R. 5-6) that there was no foreign value and that, if the merchandise were dutiable at export value, that value would be $2.5107 and $3.3598 per case respectively for 5-ounce and 8-ounce cans (R. 4-5). The American selling prices used by the appraiser as his basis of appraisal were $4.40 and $6.40 per case respectively (R. 5).

In addition to the President's proclamation (R. 37), the record also contains a "Report to the President" (R. 9), wherein the United States Tariff Commission set forth the finding that the then existing duty did not "equalize the difference in the costs of production of . . . the domestic articles and the like or similar foreign articles produced in the principal competing countries" (par. (a), R. 17); and that "the rate of duty necessary to equalize such difference is 35 percent ad valorem based upon the American selling price of the domestic article" (par. (c), R. 17).

This report contains the facts, or as stated by petitioner (p. 12 of brief) is "a complete summary of the infor-

mation" ascertained by the Tariff Commission and reported to the President. These facts may be briefly stated as follows:

On June 28, 1932 the Tariff Commission instituted an investigation of the differences in cost of production of canned clams produced in the United States and in the principal competing countries, for the purpose of ascertaining whether the duties then applicable to such merchandise were sufficient to equalize any difference in cost of production (R. 11). Such an investigation is authorized by section 336, tariff act of 1930, chap. 497, 46 Stat. 696, 19 USC 1336 (Appendix, i).

By the terms of this statute the commission is directed to ascertain certain enumerated facts, including the cost of production of foreign and domestic articles for *"a representative period,"* and to compare any difference between such costs with the amount of duty then being collected on the article for the purpose of determining whether such duties are sufficient to equalize the differences, and, if not, what rate of duty would be sufficient.

In the course of this investigation the commission selected the years 1931 and 1932 as the "representative period" for the domestic article (R. 14), and accepted the invoice prices or values of the foreign clams imported at San Francisco during the 22 months from December 1, 1931 to September 30, 1932 as representative of the foreign cost of production (R. 27). These prices were expressed in foreign currency, namely, the Japanese yen, and of course required conversion into United States currency. The commission then concluded that if the invoice prices were converted at the rates of exchange in effect at the time of each exportation the amount in dollars would not be "representative of the present or probable future invoice values in terms of dollars" (R. 14, par. 6). Thereupon the commission converted the foreign currency into

United States dollars at the average rate of exchange for the year 1932 (R. 14).

It is this action of the commission, also others which will subsequently be referred to, that respondent complains of, and the question of the legality thereof constitutes the main issue here.

II) **The basic statute and its salient points:** The authority for the Presidential proclamation and for the Tariff Commission's findings is derived from section 336, tariff act of 1930 (appendix, i).

By this law Congress delegated to the President the power to proclaim changes in duties. The policy of Congress is to permit such adjustments in accordance with the conditions specified by the statute, in order to "equalize the difference in cost of production of domestic articles and the like or similar foreign article." Also, it is clear that Congress intended that the Tariff Commission should proceed in a particular manner when carrying out its functions under this statute. These requirements manifestly include the following conditions:

1) The Tariff Commission must investigate differences in cost of production of the domestic and the foreign article.

2) In the course of this investigation hearings must be held, reasonable public notice given, and reasonable opportunity afforded to interested parties to be present, to produce evidence, and to be heard.

3) The commission must report to the President the results of the investigation and its findings with respect to differences in costs of production.

4) The commission must specify such changes in duties as are shown by the investigation to be necessary to equalize differences in cost of production.

After these conditions are complied with, the President is authorized (sec. 336-c) to approve the changes specified

in the report of the commission, "if in his judgment such . . . changes are *shown by such investigations of the commission* to be necessary to equalize the differences in cost of production."

In authorizing the President so to act Congress clearly limited his power to that of approving or rejecting the particular changes specified by the commission. Also, unlike the provision of a similar previous statute enacted in 1922 (sec. 315, tariff act of 1922, chapter 356, sec. 315, 42 Stat. 858, 941-43, 19 USC, secs. 154-9, appendix, p. viii), the President is strictly limited to consideration of the facts "shown by such investigation of the commission," and may not, as he could under the prior act, consider in addition to the data submitted to him by the Tariff Commission, any other facts he deemed relevant. *Feltex Corp. v. Dutchess Hat Works*, 21 CCPA 463, 476; *Zeiss v. United States*, 23 CCPA 7, 14; *Akawa v. United States*, 23 CCPA 75, 80.

As to the commission's actions and powers in finding cost of production and the changes necessary to equalize any differences in costs, Congress was equally specific in several particulars, as follows:

a) The "cost of production" which the commission investigates is limited by section (h) (4) to such cost "for a period which is representative of conditions in production of the article."

b) If such cost is not readily ascertainable the commission is authorized by section (e) (3) to "accept as evidence thereof, or as supplemental thereto":

> The weighted average of the invoice prices or values *for a representative period.*

c) The commission must ascertain the "duties expressly fixed by statute" and compare this amount with the differences in costs of production (sec. 336 (a) (4)).

d) The commission must specify in its report to the President *the changes which are shown by the investigation* to be necessary to equalize the differences in cost of production (sec. 336 (a)).

Therefore, so far as ascertainment of cost of production is concerned, Congress specifically directed the Tariff Commission to determine both foreign and domestic costs "*for a period which is representative of conditions in production of the article.*" Further, as to foreign articles, Congress authorized the commission, in cases where the statutory cost of production was not readily ascertainable, to accept as evidence thereof the weighted average of the invoice prices *for a representative period.*

In addition, Congress directed the commission to ascertain the "duties expressly fixed by statute," in order to determine what changes, if any, were necessary.

III) **Respondent's contentions**: Stated briefly, respondent contends that the proclamation referred to was illegal and void, because:

a) Neither the Tariff Commission, nor the President in his review of the facts submitted by the commission, complied with the provisions of section 336, tariff act of 1930, when they ascertained (1) the foreign cost of production, (2) the differences in cost of production between the foreign and domestic article, and (3) the "duties expressly fixed by statute."

b) If the procedure followed by the commission and the President is not in violation of the terms of section 336, then the statute is an unconstitutional delegation of legislative power in that it grants to an administrative agent discretion as to what the law shall be.

In particular, it is contended that, although the commission reported the foreign costs of production to the President as evidenced by a "weighted average of the invoice prices or values for a representative period," the

proclamation is invalid because based upon an investigation which was not made in accordance with the statute. More specifically, respondent's position is as follows:

1) Although the commission investigated prices or values for a selected representative period, namely, December 1, 1930 to September 30, 1932, the conversion of these prices from foreign currency (Japanese yen) into dollars *at the average rate of exchange for the year 1932* was illegal, for by this action the commission obtained a value which did not represent the cost of production referred to in the statute, i.e., the cost for the selected "representative period."

2) In violation of section 336 (a) the commission failed to ascertain the amount of "duties expressly fixed by statute" and to compare this amount with the differences in cost of production. In respect to this point it is claimed that, although the commission found that "foreign value" was dutiable value (R. 16, par. 11), it disregarded section 402 (*c*) of the tariff act of 1930 (appendix, p. v), requiring the date of exportation to be taken in ascertaining foreign value, and also disregarded section 522 of said act (appendix, p. viii) requiring foreign currency to be converted to dollars in a particular manner.

3) The commission failed to compare the amount of duty based on the American selling price as defined in section 402 (g), tariff act of 1930 (appendix, p. vi), with the difference in cost of production computed as of the same period of time.

4) The commission did not ascertain the required facts from "the investigation," but ascertained them by use of an unauthorized and illegal currency-conversion factor.

5) The commission did not specify in its report to the President such increase or decrease in rate of duty or change in basis of value as was "shown by the investigation" to be necessary to equalize the differences in cost of production.

IV) **Petitioner's contentions:** Briefly summarized, petitioner's claims are as follows:

a) The Customs Court cannot review the facts and reasoning upon which the Tariff Commission based its recommendation to the President.

b) Although foreign cost of production must be ascertained for "a representative period" and compared with domestic cost of production, yet, having once ascertained the foreign cost in terms of foreign currency, the Tariff Commission is free to convert such cost into United States currency in any manner it may deem appropriate.

V) **The court's power to review:** Under a statute of similar purpose but of different context, namely, section 315, tariff act of 1922, this court held, in *Hampton v. United States*, 276 US 394, 409, that:

> The same principle that permits Congress to exercise its rate-making power in interstate commerce by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise.

Consequently, as the Tariff Commission and the President act under section 336 as agents of Congress invested with power to change existing duties, it follows that their actions may be the subject of judicial review directed towards determining whether compliance was had with the terms of the statute granting them the powers which they exercised.

This principle of law is well recognized and has been frequently applied in litigation involving property rights, and although there have been few, if any, customs cases in this court wherein the point has been specifically passed upon, questions involving similar points have been decided, as follows:

a) *Robertson v. Frank,* 132 US 17, 24; *Muser v. Magone,* 155 US 240, 247; *United States v. Passavant,* 169 US 16, 21, holding that, although appraisement of merchandise was conclusive and not subject to judicial review, yet, if the appraiser proceeded upon a wrong principle, contrary to law or added illegal items to the value, or transcended the powers conferred by statute, his appraisement was subject to impeachment.

b) *Waite v. Macy,* 246 US 606, involving an action to enjoin the Board of Tea Appeals from applying to imported tea certain tests of purity prescribed by the Secretary of the Treasury, and holding (pp. 608-9):

> Upon them (the facts) the plaintiffs (the appellees) say that the government is attempting to apply criteria not allowed by law. The government says that the bill is an attempt to control a board in the performance of its statutory duty and to substitute the judgment of a court for that of a board.
>
> No doubt it is true that this court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by a decision on purity, quality, or fitness for consumption. Morrill v. Jones, 106 US 466, United States v. United Verde Copper Co., 196 US 207, 215, United States v. George, 228 US 14, 21.
>
> * * * * * * *
>
> The Secretary and the board must keep within the statute (Merritt v. Welsh, 104 US 694), which goes to their jurisdiction (see Interstate Commerce Commission v. Northern P. E. Co., 216 US 538, 544).

In its brief filed herein the United States contends (p. 8) on authority of *Norwegian Nitrogen Products v. United States,* 288 US 294, that there can be no review of the facts and reasoning on which the judgment of the Tariff Commission and the President was based.

This decision is not an authority for such a contention. The question in that case, as stated by the court (p. 303) was:

> The decision of this case hinges upon our answer to the question whether the petitioner has been "heard" in accordance with the statute.

In deciding this question, which was the sole one involved, this court considered the legislative history of the flexible-tariff system, the Congressional method or practice of tariff legislation, and the history of the Tariff Commission and similar bodies, and then concluded that an interested party did not have the right of acess to all data collected by the commission, or the right to cross-examine investigators and competitors upon such data. In the course of its opinion the court compared the procedure of the commission, under the tariff act of 1922, with that of other bodies such as the Interstate Commerce Commission, and stated (p. 318) that "the Tariff Commission advises; these others ordain."; also (pp. 318-9):

> What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate of duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment *if the prescribed forms of legislation have been regularly observed.*
>
> * * * * * * *

This decision, stating that the action of the President is not subject to impeachment "if the prescribed forms of legislation have been regularly observed," and relating to a statute of similar purpose to the present statute, supports respondent's contention that the Customs Court may here review the actions of the Tariff Commission to deter-

mine whether the conditions of the statute, or "the prescribed forms of legislation," were regularly observed.

However, as to other facts referred to in the opinion, it should be noted that section 315 differed in material respects from the present section 336, and that therefore not all that was said there is applicable to the present law or to the instant case. As was said by the Court of Customs and Patent Appeals in *Moss v. United States*, 26 CCPA, 381, 385, 103 F. (2d) 395, involving an action arising under section 336, tariff act of 1930:

> The case (Norwegian Nitrogen Products v. United States) arose under the flexible provisions of the 1922 act; and much was said in the course of the opinion that has no application to proceedings under the 1930 act, which, as heretofore pointed out, limits the President in the exercise of his judgment to a consideration of the facts developed before the commission in the course of its investigation.

Since the creation of the Court of Customs and Patent Appeals in 1910 very few customs cases have been before this court, and only two of these, *Hampton v. United States*, supra, and *Norwegian Nitrogen Products v. United States*, supra, have pertained to the so-called flexible-tariff provisions first enacted in 1922. Since 1922 the Court of Customs and Patent Appeals has passed upon several cases involving various claims as to the invalidity of Presidential proclamations issued either under section 315, tariff act of 1922, or section 336, tariff act of 1930, and among its decisions is found the following matter relevant to the question of judicial review referred to above.

a) *Foster v. United States*, 20 CCPA 15, 23 (relating to section 315, tariff act of 1922):

> The question of whether the President has proceeded in conformity with the law in proclaiming certain changes in customs duties is, in our opinion, a justiciable one which may be adjudicated in the proper forum.

b) *Fox River Butter Co. v. United States*, 20 CCPA 38, 45 (relating to section 315, tariff act of 1922; certiorari denied, 287 US 628):

> Accordingly, if the President had increased the rates of duty provided for in paragraph 710 without a *legal* investigation by the Tariff Commission, the assessment by the collector of such duties might be challenged by protest, and the court below and, on appeal, this court have authority to determine the issues raised thereby. The Congress, of course, contemplated that the Tariff Commission would make full, fair and impartial investigations to the end that the President might be fully advised and the purpose of the law consummated.

c) *United States v. Sears, Roebuck & Co.*, 20 CCPA 295, 301 (certiorari denied, 290 US 633):

> If the President in the case at bar went beyond or contrary to, or did not observe the limitations and conditions of, said section 336 of the tariff act of 1930, the legality of his order and proclamation may be reviewed by us on appeal.

d) *Hampton v. United States*, 14 CCPA 350, 369 (affirmed, 276 US 394):

> But when, in the performance of his duties under this section (315, tariff act of 1922), the President proclaims a change of duty, if, in so doing, *he acts beyond the law* or fails to comply with its express mandate, then we can not doubt but the person aggrieved thereby may find adequate relief in the courts.

e) *Mosi v. United States*, supra, 26 CCPA 381, 382-3, 103 F. (2d) 395 (relating to section 336, tariff act of 1930):

> It is true, as pointed out by counsel for the government, that the Customs Court is given no direct right of review over action of the Tariff Commission. This does not mean, however, that it is without power to con-

sider the legality of increase of duties resulting from the commission's action. The court is a court of law, and it is granted full power to relieve against illegality in the assessment or collection of duties. 19 USCA 1515, 1518. If relief may not be had before it against illegal action under the flexible-tariff provisions, relief may not be had anywhere; for its jurisdiction in such matters is exclusive. It is the tribunal established by Congress in the provision of a complete system of corrective justice for the administration of the customs laws, and questions involving the validity of official action in the imposition and collection of duties are properly cognizable before it to the exclusion of other courts. Cottman Co. v. Dailey, 4th cir., 94 F.(2d) 85, 88; Riccomini v. United States, 9th cir., 69 F.(2d) 480, 484; Gulbenkian v. United States, 2d cir., 186 Fed. 133, 135; Nicholl v. United States, 7 Wall. 122, 130. There can be no question but that courts must exercise the judicial power vested in them to determine the legal validity of administrative action, where the validity of such action is involved in questions properly before them, whether they have been granted the right of review over action of the administrative agency or not. The duty necessarily arises because of their obligation to decide cases before them according to law. See Shields v. Utah Idaho Cen. R. R. Co., 305 US 177, 59 S. Ct. 160; Crowell v. Benson, 285 US 22, 58-59; United States v. Passavant, 169 US 16; Smelting Co. v. Kemp, 104 US 636, 641; United States v. Haviland & Co., 2d cir., 177 Fed. 175.

Petitioner argues (p. 14) that by this action respondent seeks a review of the facts and reasoning upon which the judgment of the President was based. However, this is not the case. Respondent asks this court to determine whether, *in law*, the evidence upon which the commission's conclusions were based was competent; whether the commission ascertained, as required by law, the foreign cost of production as evidenced by the "weighted average of

the invoice prices or values *for a representative period,*" and whether the commission ascertained "the duties expressly fixed by statute," in order to compare them with the differences in cost of production. In other words, respondent contends that such proceedings are necessary parts of a legal investigation, and that under section 336 a legal investigation is a condition precedent to a lawful proclamation.

VI) **Legal investigation**: As to what constitutes "legal investigation" by the Tariff Commission, and "proceeding in conformity with law" by the President, the following decisions are pertinent.

a) *Foster v. United States*, 20 CCPA 15, 22, 25-6 (emphasis added):

> The Supreme Court, in affirming our judgment in the case last cited, speaking through Chief Justice Taft, called attention to the fact that the President, in performing his duties under said section 315, was acting as a fact-finding agency of the Congress, carrying out "an intelligible principle" provided by Congress in the said act, *and could exercise no discretion by which he might vary the will of the legislative body, as expressed in the statute.*
>
> . . . . . .
>
> We are also unable to agree with counsel for the government that the mere recital by the President in his proclamation that he has complied with the law is conclusive of that fact. Of course, in the absence of proof to the contrary, it will be presumed that he complied with the conditions of the statute. But this does not preclude the party affected from establishing, by proper, material, and competent evidence, that such conditions have not been complied with. To hold that this might not be done would be to give to the President the sole power to pass upon the legality of his acts.
>
> . . . . . .

If he proclaimed a change in rates on an article of commerce without a preceding investigation of differences in costs of production of such article by the Tariff Commission, of which hearing public notice, and a reasonable opportunity to parties interested to be present, to produce evidence and to be heard, had been given, his proclamation and rates of duty fixed would be void.

b) *Zeiss v. United States*, 23 CCPA 7, 14:

The President, although not required by the provisions of section 336, supra, to accept the results or findings reported by the Tariff Commission, is required to limit his consideration of the case to the evidence presented to that body, and to approve the rates of duty and changes specified by it, "if in his judgment such rates (and changes in basis of value) are shown by the investigation to be necessary to equalize such differences in costs of production." Feltex Corp. v. Dutchess Hat Works, 21 CCPA (Customs) 463, T. D. 46957.

For the purpose of the provisions of section 336, supra, the President is the agent of the Congress, and he may not act under those provisions until a legal investigation has been made by the Tariff Commission.

c) *Norwegian Nitrogen Products Co. v. United States*, 20 CCPA 27, 34-5:

Therefore, we think that such an investigation as is indicated by the provision under consideration is a condition precedent to the issuance of a valid proclamation. If no such investigation is had, the proclamation is void, and any duty levied by reason of the same is unwarranted in law.

* * * * * * *

The controlling question before us is: Was there an investigation of the character prescribed by Congress?

d) *Norwegian Nitrogen Products Co. v. United States*, 288 US 294:

> Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed.

e) *Fox River Butter Co. v. United States*, 20 CCPA 38, 45:

> Section 315 provided positively that no proclamations should be issued until an investigation had been made by the Tariff Commission. A legal investigation by the Tariff Commission was a condition precedent to the issuance of a lawful proclamation by the President.
>
> * * * * * * *
>
> The Congress, of course, contemplated that the Tariff Commission would make full, fair, and impartial investigations to the end that the President might be fully advised and the purposes of the law consummated.

f) *Moss v. United States*, 26 CCPA 381, 384, 385 (emphasis added):

> The act (section 336) contemplates not merely that the Commission shall conduct an investigation with notice and hearing, *but also that it shall base its findings and recommendations embodied in its report on what is shown by the investigation, and that the President in forming his judgment shall be confined to what is so shown.*
>
> * * * * * * *
>
> This does not mean that the court may review the facts or substitute its judgment for that of the Commission. It means merely that, where the question is properly raised, it must determine whether the Commission acted within the scope of the authority granted it by Congress.

From these decisions it is clear that the Customs Court may declare a proclamation to be void, if it appears that

the commission did not make an investigation such as is provided for by the statute, or that the President acted contrary to the provisions of section 336, or that the commission's actions were not fair and impartial.

VII) **Distinction between tariff acts of 1922 and 1930:** As both decisions by this court in cases pertaining to the flexible-tariff provisions (*Hampton v. United States*, supra, and *Norwegian Nitrogen Products Co. v. United States*, supra), and many of the decisions by the Court of Customs and Patent Appeals in similar litigation, relate to actions brought under the tariff act of 1922 (section 315), rather than the act of 1930 (section 336), the differences in the respective provisions of the two acts must be kept in mind when considering the present case in the light of these decisions.

As stated by this court in *Hampton v. United States*, 276 US 394, 404, the President, under section 315, tariff act of 1922, "was provided with a body of investigators (Tariff Commission) who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments." Also, as pointed out in the same case by the Court of Customs Appeals (14 Ct. Cust. Appls. 350, 362), he was required to determine three things: (a) The principal competing country; (b) cost of production in the United States, and (c) cost of production abroad. Also, although "a very broad latitude was given to the President in making such findings of fact" (p. 362), his mere recital that he had complied with the law was not conclusive of that fact (*Foster v. United States*, supra, p. 25). As to the function of the Tariff Commission it was held that "a legal investigation by the Tariff Commission was a condition precedent to the issuance of a lawful proclamation" (*Fox River Butter Co.*, supra, p. 45), and that, "the commission having made a legal investigation, the President was not limited nor bound by the evidence sub-

mitted to it, as he is under subsection (c) of section 336, tariff act of 1930, . . . but, on the contrary, might, if he saw fit to do so, secure information from any source deemed proper by him" (*Akawo v. United States*, 23 CCPA 75, 80). Therefore, as stated in the *Akawo* case (p. 80):

> The mere fact that the commission may have committed error, . . . so long as its investigation was a legal one, is not of vital consequence so far as the provisions of section 315 are concerned.

Under the tariff act of 1930 a different situation exists and the commission is now charged with determining the following facts under section 336:

1) Differences in cost of production of any domestic article and any like or similar foreign article (section 336-a).

2) Whether "the duties expressly fixed by statute" equalize the difference in cost of production (section 336-a).

3) "Such increases or decreases in rates of duty expressly fixed by statute" as are necessary to equalize such differences (section 336-a).

4) In certain cases (section 336-b), the ad valorem duties based upon American selling price (as defined in section 402-g) of the domestic article which are necessary to equalize such differences.

In determining these facts the commission is empowered to select a "period which is representative of conditions in production of the article" (section 336-h-4), and after all of these facts have been determined from its "investigation" the commission is required (section 336-a) to "report to the President the results of the investigation and its findings with respect to such differences in cost of production," and to specify such increase, decrease or

change in basis of value as it finds shown by the investigation to be necessary to equalize such differences.

Upon receiving this report the President is directed (section 336-c) to:

> Approve the rates of duty and changes in classification and in basis of value specified in . . . (the report), if in his judgment such rates of duty and changes are shown *by such investigation of the commission* to be necessary to equalize such differences in cost of production.

Therefore, under the present law the commission, rather than the President, determines the facts and specifies the necessary changes. However, according to *Feltex Corp. v. Dutchess Hat Works*, 21 CCPA 463, 476, he "is not in any way bound by the 'results' or 'findings' reported by the Tariff Commission," and is merely:

> Required to approve the rates specified by it, if in his judgment such rates are "shown by such *investigation*" to be necessary to equalize such differences in cost of production.

Also (p. 476):

> The President, in forming his judgment, is confined to a consideration *of the facts* secured by the Tariff Commission in its investigation, and is further limited to approval of the rates specified by the commission if he finds, *from such investigation*, that the rates so specified are necessary to equalize cost of production.

Also, as was said in *Moss v. United States*, supra, p. 385, in respect to the decision of this court in *Norwegian Nitrogen Products v. United States*, supra:

> The case arose under the flexible provisions of the 1922 act; and much was said in the course of the opinion that has no application to the proceedings under the 1930 act, which, as heretofore pointed out, limits the President in the exercise of his judgment to a

consideration of the facts developed before the commission in the course of its investigation.

Thus, the legislative policy of Congress has been clearly and definitely expressed, to wit, if the facts secured by the commission show that existing duties are insufficient to equalize differences in cost of production, the President shall proclaim the changes recommended by the commission. It is equally clear that the conclusions of the President and the commission must be based on facts, so far as they can be obtained, and that the discretion of neither of these two agents of Congress can be substituted for the prescribed formula.

In accordance with this change of law it is an importer's right to ask the court, in proceedings properly brought, to examine facts established "by proper, material, and competent evidence" (*Foster* case, supra, p. 25), for the purpose of determining: a) Whether the commission complied with the terms of section 336, and (b) whether "there were no facts ascertained by the commission in its investigation that would warrant the presidential proclamation here involved" (*Fèlter* case, supra, p. 477).

VIII) **Related statutes**: Reference has been made herein to "foreign value," "American selling price," and "conversion of currency." These terms are defined or explained in sections 402 (*d*), 402 (g), and 522, of the tariff act of 1930, as set forth in the appendix hereto (pp. v, vi, viii). Briefly stated, "foreign value" is the market value or price *at the time of exportation to the United States* at which merchandise is sold or freely offered for sale, and it is this value which the commission found was being used at the time of the investigation (R. 16, par. 11). "American selling price" differs from foreign value in that it is the price at which an American article is being sold or offered for sale in the principal markets of the United States *at the time of exportation of the imported*

article. It is this value which the President directed should be used here.

Conversion of foreign currency for the purpose of the assessment and collection of duties upon merchandise imported into the United States is controlled by section 522, which directs that such conversion shall be made at the values proclaimed by the Secretary of the Treasury "for the quarter in which the merchandise was exported."

Section 522 indicates a Congressional intention to require a uniform basis for conversion of currency in all matters pertaining to customs duties. Therefore if section 336 is at all ambiguous recourse may be had to the wording of related sections of the same act to determine the intent of Congress. *Norwegian Nitrogen Products Co. v. United States*, 288 US 294, 315-6.

In addition to its effect in determinfng "cost of production," a reference to section 522 is *required* in order for the commission and the President to ascertain other facts specified by section 336. The statute states that, "if the commission finds it shown by the investigation that the *duties expressly fixed by statute* do not equalize the differences in cost of production, . . . the commission shall specify in its report such increases and decreases in *rates of duty expressly fixed by statute*," etc.

Obviously this language contemplates that the commission shall determine the *amount* of duties "expressly fixed by statute" by reference, in the case of merchandise subject to ad valorem duties, (1) to the proper dutiable value, and (2) to the proper rate of duty. The amount thus ascertained should then be compared with the differences in production costs.

Here the commission found that the rate of duty was 35 percent ad valorem, and that "foreign value" was the dutiable value (R. 16, par. 11). Therefore, a reference to section 402 (c) was essential in order to determine the

meaning of "foreign value," and such reference shows that foreign value is the value *"at the time of exportation to the United States."* Consequently, as these values were expressed in yen and not in dollars (R. 16), use of the proclaimed value referred to in section 522 "for the quarter in which the merchandise was exported" was required. This the commission failed to do, for it is stated in the report that (R. 16):

> The dutiable value of the Japanese product during 1931 and 1932, *converted to dollars at the average rate of exchange for the year 1932*, was $1.71 per case for the 10-ounce tins and $2.252 per case for the 15-ounce tins.

In making its investigation and in determining the all-important point of whether the statutory duty of 35 per cent, if applied to this dutiable value, equalized the difference in cost of production, the commission ascertained the duty by converting the yen at the arbitrarily selected rate of .2811 (table 13, R. 30; also R. 16). In this single particular, if in no other, the commission did not comply with the law.

Section 336 (b) directs the commission in certain cases to find a rate of duty, based upon the American selling price as defined in section 402 (g), sufficient to equalize differences in costs of production. In the present case the commission proceeded under this subsection, and found the American selling price of domestic clams (table 13, R. 30) as of September, 1931 and 1932 (table 9, R. 26). These dates were within the selected representative period. The commission then found that a rate of duty of 35 percent (based upon the American selling price) was necessary to equalize the difference in cost of production. However, the foreign cost of production was taken from values found for a different period; namely, the 22 months from December 1, 1930 to September 30, 1932, converted

at the average *1932* figures. Consequently the two facts, amount of duty and cost differential, were not compared as of the "representative period." Here again the commission did not comply with the law, for as said in the *Feltex* case, supra, 21 CCPA 476, 478:

> It is clear that Congress, in using the term "representative period," had in mind that conditions upon a given day or during a given month might not fairly reflect the prices at which the merchandise was imported into the United States, but in order fairly to determine invoice prices as evidence of costs of production, they should be considered over a representative period, and their weighted average *over such period* might be accepted.

Reference to other portions of the tariff act of 1930 aids in determining the questions here presented. Section 336 (e) (2) authorizes the commission to accept the weighted average of "the invoice *prices* or *values*" as evidence of cost of production. Section 402 (a) (appendix, p. v) states that "*for the purposes of this Act*, the *value* of imported merchandise shall be . . . (1) the foreign value or export value, whichever is the higher," and as provided for in sections 402 (c) and (d) "foreign" and "export" values are determined as of dates of exportation. By this definition Congress specified the value it authorized the commission to use.

Other portions of the tariff are also of utility in construing section 336 (e) (2). Section 481 (appendix, p. vi) directs that (a) "all invoices of merchandise imported into the United States shall set forth . . . (5) the purchase price of each item in the currency of the purchase, . . ." or "(6) . . . the price in such currency that the manufacturer, . . . would have received or was willing to receive, for such merchandise." By section 484 (b), (appendix, p. vii) an importer is required to file with the collector a certified invoice and declare under

oath (section 485-a, appendix, p. vii) that (section 485 (a) (2)) the prices set forth in the invoice are true. Therefore by virtue of these statutory definitions and directions it is clear that the "invoice prices or values" referred to in section 336 (e) (2) are the prices or values at the time of exportation. Consequently the commission did not ascertain the weighted average of such prices or values for a representative period, when it selected a rate of exchange other than those in effect upon the dates of exportation.

IX) **Prerequisites of a valid investigation**: As already observed, section 336 requires the commission to hold hearings and to give notice thereof to interested parties, and as held in the *Zeiss* case, supra, 23 CCPA, performance of these external acts is a condition precedent to legal procedure. But these are not the sole requirements. The commission is also charged with determining whether "duties expressly fixed by statute" equalize differences in cost of production.

This requires the commission to determine the amount of such duties by ascertaining dutiable value as *fixed by statute*, and applying thereto the tariff rate applicable to the merchandise under investigation.

Also, in order that the statutory comparison may be made with the difference in costs of production, the commission must first ascertain those costs.

If the commission finds, as in this instance, that the difference can not be equalized by a change in rate of duty, then under subsection (b) it must find the ad valorem rate "based upon the American selling price (*as defined in section 402-g*) of the domestic article" necessary to equalize such differences. Then the commission makes a second comparison, this time between (1) the amount of duty based upon American selling price and (2) the difference in production costs.

In each of the various processes above mentioned, the commission is controlled by statute. In order to find the amount of "duties expressly fixed by statute" the commission must turn to sections 402 and 522 for the purpose of determining (1) the dutiable value as expressed in foreign currency, and (2) the dutiable value as expressed in dollars; for it is impossible, under the circumstances of this case, to ascertain an *amount* of duty without first converting foreign value into American money and applying the statutory rate of duty.

To determine the difference in productions costs the commission must proceed in accordance with subsection 336 (b) or 336 (e), and is not authorized to substitute its discretion for the procedure therein set forth.

As to the third requirement (resort to American selling price) the commission must find this price "as defined in section 402 (g)." Consequently the price must be taken as of the "time of exportation of the imported article." Therefore Congress has clearly indicated that foreign invoice prices should also be taken as of the dates of exportation.

Not only is this the rule of reason, but the rule imposed by section 402 in the provision in subsection (a) that "*for the purposes of this Act* the value of imported merchandise shall be (1) the foreign value or the export value." This is supplemented (i) by the provision in subsections (c) and (d) that foreign value and export value shall be found as of "the *time of exportation* of such merchandise to the United States," and (ii) by the provision in subsection 402 (g) that the American selling price of any article produced in the United States shall be found as of "the *time of exportation* of the (competitive) imported article."

X) **Averages for representative period, and false currency conversion**: The commission found, and so reported to the President (R. 15, par. 9):

> The cost of production, as defined in section 336 (h) (5), was not readily ascertainable for the principal competing country, and the commission, in accordance with section 336 (c) (2) (A), accepted as evidence thereof the weighted average invoice prices of imports from that country.

In view of the fact that actual cost of production could not be ascertained, the commission's use of invoice prices was authorized, and it is only by examining the report and noting the method used in arriving at the "weighted average" that the illegality of the commission's acts becomes apparent. In this respect it should be noted that the selected "representative period" for the foreign article was from December 1, 1930, to September 30, 1932. The method was as follows (R. 14, par. 6):

> 6. *The years 1931 and 1932 are representative with respect to the* domestic cost of production of canned clams and the *invoice prices of Japanese clams, in terms of Japanese currency.* During most of the year 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. *For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative* of the present or *probable future* invoice values in terms of dollars. The commission has, therefore, used, for *comparison with the domestic costs*, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, *converted to dollars at the average rate of exchange for 1932.*

Respondent contends that the commission's method of converting foreign currency into dollars, as thus stated, is not in accordance with the statute. It will be noted that

the commission converted the yen into dollars on the basis of the average rate of exchange for 1932, instead of the rate actually prevailing at dates of invoices used. The provision for "the weighted average of the invoice prices or values for a representative period," of course means actual, and not speculative or arbitrarily imputed, "prices or values." In its discretion the commission may determine (a) what is a "representative period" (*Feltex* case, supra, 21 CCPA 476, 479, and (b) how values shall be "weighted." However, as said in the *Feltex* case, p. 478, "cost of production as defined in section 336 (h) includes the *various factors therein specified* 'for a period which is representative of conditions in production of the article.'" Consequently all of the factors must be determined as of this representative period.

In accordance with this rule the commission may not juggle with prices and values by taking those of April 1, 1931, for instance, when the yen had a proclamed value of 49.85 cents and an exchange value of 49.354 cents (Treasury Decisions 44737, 44752), and convert them into American dollars "at the average rate of exchange for 1932," during which time the exchange rate was as low as 20 cents (Treasury Decision 46013, for November 30, 1932), and for many months was off from about 40 to nearly 60 percent. Note the commission's computation of the "average" for 1931 and 1932, as being 48.85 and 28.11 cents respectively (table 14, R. 30).

There is no logical or plausible reason why, in finding cost of production, the commission should convert "to dollars at the average rate of exchange for 1932," any more than at the average rate for the entire period of 22 months (December 1, 1930, to September 30, 1932), or for the final three months, or the initial six months, or for any other partial period.

Suppose that these clams, as often happens with other commodities, had been invoiced in United States currency (See Tariff Commission report 107, Frozen Swordfish, p. 62 of this brief). There would have been the same disparity between dollar values of 1931 and the dollar values of 1932 as that found by the commission in yen values for the same years. Under such circumstances it is not to be believed that the commission would have taken an analogous step and stated the value of the dollars as different from its actual value.

The illegality of the procedure followed by the commission arises out of the fact that by use of this false value the commission did not ascertain "the weighted average of the invoice prices or values for a representative period," as required by section 336. Neither did the commission ascertain the true differences in cost of production. Consequently an essential part of the required investigation was omitted. Also the change recommended to the President was not based upon data obtained in accordance with the statute.

While the commission in its discretion probably may decide what is a representative period, the date for that period must be historically correct. It is an obvious and amazing abuse of discretion for the commission to impute a value of .2811 to the yen for a long period during many months of which it was in fact .4985, and for which period, except the single month of September, 1932, no invoices were used where the exchange rate was lower than .3216 (table 11, R. 28; table 14, R. 30). If the truth may be thus ignored, the commission may with equal propriety disregard other crucial facts, such as quality of merchandise, its identity, or its domestic value, or transportation costs. Once started on this illegal course, there is no logical stopping place, and the commission becomes the sole arbiter of rates of duty.

In reference to this procedure the court below, in an able opinion by Judge Hatfield, held (R. 66-7) that:

> Obviously, the commission did not find the weighted average of the invoice prices for a representative period. On the contrary, it found a weighted average by using two separate periods, neither of which was representative. The formula used by the commission was not that prescribed by the Congress, but one which the commission evidently thought was better adapted to the exigencies of this particular case.

The court also outlined the effect of the procedure as follows (R. 67-8, emphasis added):

> By following its own formula, the commission found it impossible to equalize the difference in costs of production of the foreign and domestic articles by raising the 35 per centum ad valorem rate of duty provided in paragraph 721 (b), supra, 50 per centum, the maximum increase provided in section 336 (a), supra, and, accordingly, found it necessary to apply the 35 percentum ad valorem rate of duty "based upon the American selling price (as defined in section 402-g) of the domestic article," in accordance with the provisions of section 336 (b), supra. Had the commission followed the second formula hereinbefore stated, the difference in cost of production of the foreign article and the domestic article would have been much less, and consequently the customs duties necessary to equalize such differences would have been much less. Or had the commission followed the formula prescribed by the Congress, the difference in cost of production of the foreign and domestic articles would have been less than that found by the commission and greater than that which it might have found had it followed the second formula, and consequently the customs duties necessary to equalize such difference in cost of production would have been less than that found by the commission in the instant case, and greater than that which the commission would have found had it followed the second formula.

> *It is clear, therefore, that if the commission has authority to do what it did in the instant case, it has authority to find on the same facts at least three entirely different costs of production for the foreign article, and, instead of recommending to the President a rate of duty based upon findings of fact, could recommend a rate of duty in accordance with its own economic theories.* Such authority necessarily involves a discretion as to whether tariff duties shall be high or low, or whether they shall be high in certain instance and low in others; a discretion, legislative in character, which the Congress had no power to delegate. *Hampton & Co. v. United States*, 276 US 394, and cases therein cited. Obviously, the Congress did not intend to delegate any such power to either the Tariff Commission or the President.
>
> The Congress has given the Tariff Commission wide latitude, so that the difference in cost of production of a domestic and a like or similar foreign article might be properly ascertained. In so doing, however, the Congress has prescribed certain limitations and laid down certain definitions, which the Tariff Commission has no right to ignore. *Hampton & Co. v. United States*, supra.

The foregoing argument and the quoted portion of the court's decision were based upon the statement made by the commission (R. 27) that they had:

> Analyzed records of imports at San Francisco, the principal port of entry, for the 22-month period, December 1, 1930, to September 30, 1932, for the purpose of obtaining average import prices as evidence of Japanese costs of production.

Also, that (R. 29):

> The Japanese costs (as evidenced by invoice prices), and the dutiable values, have been converted from yen to dollars at the average rate of exchange for the year 1932, namely, $0.2811.

However, a reference to table 11 (R. 28), shows that "negligible imports" were made from April to August, inclusive, 1932. Therefore those from December 1930 to March 1932, and those in September 1932, were virtually the only ones actually considered. The fact that prices were taken for only 4 months of 1932 illustrates with greater force the unfairness of applying the average rate of exchange for the entire year. For three of these four months the average rate of exchange was .3415, and for all of them .3208. Also, as shown by table 14 (R. 30) the average rate for *the 8 months* during which the commission actually obtained prices was approximately .4814!

If the law permitted the commission to use any other rates of exchange than those in effect at the times of exportation, it would seem clear that the direction to the commission to accept "the weighted average of the invoice prices" (sec. 336 (e) (2)) could mean only that the average rate of exchange in effect while the merchandise was exported could be applied, and as shown above, this average was .4814, a rate 79 percent higher than the rate used. In view of the careful and particular manner with which the commission's duties are outlined, it hardly seems possible that Congress intended that the commission should adopt whatever rate of exchange it chose and by such means circumvent the manifest purpose of having duties adjusted on a scientific and fairly accurate basis.

XI) **Method used in computing cost of production:** Petitioner asserts (p. 17 of brief) that "it does not appear from the proclamation whether the President accepted the reasoning of the Tariff Commission or predicated his approval of the commission's recommendation upon his own conclusion drawn from the facts set forth in the commission's report."

In one respect this would be immaterial, for a legal investigation is necessary, and if these acts were contrary

to law the commission's investigation was not legal. Consequently the proclamation would be void. However, as is shown below, the report of the commission contains evidence sufficient to show that the President proceeded on the same erroneous basis.

Table 11 (R. 28) contains data sufficient to demonstrate that the conclusion of the President could not have been based upon the *facts* found by the commission, but must have been based upon use of the erroneous conversion factor.

Under section 336 (c) the ultimate conclusion which the President must make is whether the change specified by the commission is "shown *by such investigation of the commission* to be necessary to equalize such differences in costs of production." The difference thus referred to is defined in subsection (a), in this language:

> . . . the duties expressly fixed by statute do not equalize the difference in the cost of production of the domestic article and the like or similar foreign article when produced in the principal competing country . . .

To arrive at this ultimate conclusion the President was first required to *find from the investigation* the differences in costs of production. After finding these differences the President then should determine whether the change specified by the commission was "shown by such investigation" to be necessary to equalize the difference.

If he found that the new rate or change in basis of value was necessary to equalize the costs of production, he was then required to "approve the rates of duty and changes . . . in basis of value specified in any report of the commission." However, before the President can legally, and not arbitrarily, approve the rate of duty or change in basis of value, he must, in his judgment, determine that "such rates of duty and changes *are shown by*

the investigation of the commission to be necessary to equalize such differences in costs of production." Therefore, an examination can be made of the facts which were before the President in order to determine whether, as stated in the *Feltex* case, supra, p. 477:

> The record discloses that there were no facts ascertained by the commission in its investigation that would warrant the presidential proclamation here involved.

Furthermore, if use by the commission of a rate of exchange other than the ones prevailing, during "the representative period" was contrary to the statute, then the President's actions may be examined in order to determine whether he also used this rate of exchange. This is similar in principle to the supposifitious case referred to in *United States v. Leon*, 20 CCPA 49, 53, as follows:

> If, in ascertaining the differences in costs of production, the President had been limited by statute to a consideration of certain facts, which did not include the transportation costs complained of, and if it had been legally established that the President had included such costs, it might well be argued that the law had not been complied with.

The *Leon* case related to an importation under the 1922 tariff. Under the 1930 tariff the President must base his conclusion upon the Tariff Commission's "investigation," and this of course means the facts ascertained by the investigation.

Let us now examine the information and facts which the President had before him. In table 11 (R. 28) dutiable value and packed value (as evidenced by invoice prices) are given for the two sizes of imported clams, in Japanese yen and in the dollar equivalent, both at the prevailing rates of exchange on dates of exportation, and also at the average rate for 1932. The figures are as follows:

Size	Dutiable value			Packed value		
	Yen	At prevailing rate	At average rate in 1932	Yen	At prevailing rate	At average rate in 1932
10-oz.	6.0688	$2.7175	$1.7060	5.6277	$2.5266	$1.5820
15-oz.	8.9760	4.3027	2.5233	8.5375	4.0858	2.4000

Basically, these two types of values were essential: "Dutiable" value must be used for ascertaining the amount of existing duties, and "packed" value was an element of production costs.

The values given above were the basic figures prepared by the commission from which the President was required to determine whether or not the existing duties equalized any difference in the cost of production.

In making its comparison the commission had used the dollar values which it obtained by converting the yen values as stated, at the *average* rate, as follows (table 13, R. 30):

	10 ounces	15-6 ounces
Domestic cost:		
At factory	$4.24	$5.84
Transportation and delivery	.26	.42
	$4.50	$6.26
Foreign cost:		
At factory (as evidenced by invoice values)	$1.58	$2.40
Transportation and delivery	.30	.37
	$1.88	$2.77
Excess of domestic cost	$2.62	$3.49

These figures show a difference in cost of production; and the following computation shows that the "duties expressly fixed by statute" (35 percent ad valorem) do not equalize this difference:

	10 ounces	15.6 ounces
Excess of domestic cost	$2.62	$3.49
35 percent of dutiable values, $1.706 and $2.5233, at *average* rate of exchange (table 11, R. 28)	.60	.88
Necessary to equalize, at average rate of exchange	$2.02	$2.61

In table 13 (R. 30) the American selling price for each size is given as $5.51 and $7.02 per case, respectively; and duty at 35 percent of this value, compared with the assumed differences in cost of production, is as follows:

	10 ounces	15.6 ounces
Domestic cost plus transportation	$4.50	$6.26
Foreign cost plus transportation	1.88	2.77
Difference (excess of domestic cost)	$2.62	$3.49
Specified duty of 35 percent on American selling price of $5.51 and $7.02	$1.93	$2.46

This was the method of comparison used by the commission, and, as will be demonstrated below, used by the President. However, a similar comparison, based upon use of the *prevailing* rate of exchange rather than an arbitrary *average* rate, shows that the changes "specified in any report of the commission" *were not* "necessary to equalize such differences in costs of production." This is why it is certain that the President used the same erroneous method as the commission.

The comparison is as follows: All values given below appear in tables 11 and 13 (R. 28, 30); and in each instance, except the transportation charges of the foreign article, the yen value of the foreign article has been converted at the prevailing rate of exchange on date of exportation. As the amount of the transportation charges, when converted from yen to dollars at the prevailing rate

of exchange, was not stated by the commission, the figures here given are those used by the commission. See "comparative costs" (R. 29; table 13, R. 30). This factor, however, is in petitioner's favor, as it shows a lower transportation cost.

COMPARATIVE COSTS

		10 ounces	15-6 ounces
Domestic (table 13):			
Cost plus transportation and other delivery charges		$4.50	$6.26
Foreign (table 11):			
Cost	*Transportation*		
2.5266	.30	2.83	
4.0858	.37		4.46
Difference in cost of production		$1.67	$1.80
"Duties expressly fixed by statute":			
35% of 2.7175 (dutiable value, table 11)		.95	
35% of 4.3027 (dutiable value, table 11)			1.51
Deficiency in duty necessary to equalize costs		$ .72	$ .29

"Had the commission proceeded on the above basis, it would likewise have found that the existing rate of duty did not equalize the differences in production costs, and therefore it would have been the commission's duty to:

> Specify in its report such increases or decreases in *rates* of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences.

The commission did not, however, proceed on this basis, but specified to the President a duty of 35 percent based upon the American selling price. With these facts before him, it became necessary under section 336 (c) for the President to:

> Approve the . . . changes in basis of value specified in (the) report of the commission . . . if in his judgment such . . . changes (were) *shown by such investigation* to be *necessary to equalize* such differences in costs of production.

The effect of the change actually specified by the commission, when compared with the *true* facts as to foreign, dutiable and packed values ascertained by use of *prevailing* exchange rates, was as follows:

	10 ounces	15-6 ounces
Difference in cost (see "comparative costs", above):	$1.67	$1.80
Duty of 35 percent of American selling price as specified by commission:		
10 ounces, 35 percent of 5.51:	$1.93	
15 ounces, 35 percent of 7.02:		$2.46
Excess over amount of duty necessary to equalize costs	$0.26	$0.66

These figures show that the President used the values based upon the average rate of exchange; for if this were not true, he could not have approved the change specified by the commission, because the law merely permitted him to proclaim such changes as are *necessary to equalize the differences in costs of production*. Approval of the recommended rate resulted, as is shown above, in assessment of duty in excess of that required to equalize the difference in production costs. Furthermore, the President exceeded his authority; for, from the information before him, he could not, except by use of foreign values converted at the average rate of exchange, have found that the recommended rate of duty was necessary.

Although the majority of the court below held that the proclamation was invalid because (R. 67-8) "a legal investigation by the Tariff Commission—a condition precedent to issuance of a lawful proclamation by the Presi-

dent—has not been made," one member of that court (Judge Lenroot) stated (R. 71):

> It is my judgment that if there was any substantial evidence before the commission to sustain the proclamation of the President, it was valid, notwithstanding any error made by the commission in drawing its conclusions from the facts secured by it in its investigation.

This point is answered by the record. As shown above, a duty of 35 percent ad valorem based on the American selling price of $5.51 and $7.02 per case (table 13, R. 30) was warranted only in the event the differences in costs of production were at least equal to the amount of such duty, namely $1.93 per case for the 10-ounce size and $2.46 per case for the 15-ounce size. As the cost of producing the domestic article, plus transportation charges, was $4.50 and $6.26 per case for each of these sizes (table 13, R. 30), it would be necessary to find a foreign cost of production, including transportation charges, of $2.57 and $3.80 per case for each type to justify the recommended duty. As shown by the report, the transportation charges, even when converted at the low rate of exchange of .2811 (R. 29, and table 20, R. 36), were 30 cents per case for the 10-ounce size and 36.53 cents per case for the 15-ounce size. Therefore to justify the recommended amount of duty, namely, $1.93 and $2.46 per case, the President would have been required to base his approval upon an existing foreign cost of production not in excess of $2.27 for the 10-ounce size and $3.43 for the larger size.

As shown by table 11 (R. 28), the weighted averages of the invoice prices at *prevailing* rates of exchange were $2.52 and $4.08 respectively. Therefore there was no "substantial evidence before the commission to sustain the proclamation." In addition, table 11 shows that during the entire "representative period" the value of the 10-ounce size, when converted at prevailing rates of ex-

change, was higher than $2.27 per case except in January, February, March, and September, 1932, and the 15-ounce size exceeded $3.43 per case in each month except February, 1932. Inasmuch as the law does not permit the President to select the "representative period," it cannot be assumed that he might have based his conclusion upon the values existing during these few months.

Judge Lenroot also stated (R. 71):

> There is nothing in the report of the commission or in the record indicating that it did not also have before it invoice prices of imports from Japan, in terms of yen, for the year 1933 and immediately preceding the date of its report, which was April 5, 1934.

On this point the commission's report, which petitioner states (p. 12) is "a *complete* summary of the information obtained in its investigation," is self-explanatory, for it states (R. 27):

> The commission analyzed records of imports entered at San Francisco, the principal port of entry, for the 22-month period, December 1, 1930, to September 30, 1932, for the purpose of obtaining average import prices as evidence of Japanese costs of production.

In view of this specific statement as to the scope of the inquiry, it hardly seems plausible to assume that the commission might also have obtained such data for another period.

However, there is this additional reason why such an assumption should not be made: Section 336 charges the commission with the duty of determining a period of time representative of costs of production, and here the commission selected the years 1931 and 1932 for that purpose (R. 14). Therefore it cannot properly be assumed that the President might have had similar data before him relating to cost of production (as represented by invoice prices)

for a different period of time; namely, 1933 and up to April 1934.

Under section 336 (e) the ascertainment of cost of production is committed to the commission, and Congress required that certain definite facts be taken into consideration. They include, among others, "for a period which is representative of conditions in the production of the article," the cost of materials, labor, general expenses, etc. Therefore there can be no legal basis for an assumption that the President might have had such data for another period of time. If this were so, it follows that the President and not the commission selected a "representative period" for the foreign article, and compared it with the costs of the domestic article existing in a different representative period. Such a procedure would clearly be contrary to the statute.

XII) **Other relevant factors**: Although the commission specifically found that "no other relevant factors constituting an advantage or disadvantage in competition were disclosed during the course of the investigation" (R. 5), still the theory is advanced by counsel for petitioner (p. 26), as it was in the court below, that use of a false rate of exchange is permissible under section 336 (e) (2) (C), which allows the commission to take into consideration "other relevant factors that constitute an advantage or disadvantage in competition." Such an argument is fallacious; for, after having ascertained the foreign costs in accordance with the statute, if the commission found that the duty expressly fixed by statute *did* equalize differences in costs of production, then they might, in their own discretion, and under the guise of "other relevant factors," use an improper rate of exchange, to alter these values in any manner they saw fit. Certainly the use of an *erroneous* exchange rate is not a "relevant factor" referred to in the section.

Also, as was pointed out by the court below (R. 84):

> The Congress certainly did not intend that, in finding the "weighted average of the invoice prices or values" of a foreign article "for a representative period," the commission should take into consideration "other relevant factors that constitute an advantage or disadvantage in competition." It is obvious that Congress intended that such relevant factors, if any, should be considered by the commission independently of, or supplementary to, the weighted average of the invoice prices or values of a foreign article for a representative period.

This conclusion is manifestly sound. Section 336 (e) directs the commission to take into consideration "in ascertaining the *differences* in cost of production" the following facts:

1) As to the domestic article: (a) the cost of production as defined by the statute, (b) transportation costs, and (c) other relevant factors that constitute an advantage in competition.

2) As to the foreign article: (a) the cost of production as defined by the statute, or in lieu thereof the weighted average of the invoice prices for a representative period, (b) transportation costs, and (c) other relevant factors that constitute an advantage or disadvantage in competition.

From the very arrangement of this law it is apparent that "*other* relevant factors" may be considered "in ascertaining the *differences* in costs of production," but not considered when ascertaining the foreign cost of production as represented by invoice prices for a representative period.

XIII) **Legislative history**: It is asserted by petitioner (p. 20) that the legislative history of section 336 "shows plainly that fluctuating foreign exchange was one of the important factors which Congress considered as creating

the need for a flexible tariff"; also, that when the tariff act of 1922 was being considered (p. 21):

> The Senate Finance Committee reported that the American valuation plan was impracticable of administration and recommended in lieu thereof a flexible-tariff provision to accomplish the same result. S. Rept. 595, 67th Cong., 2d sess., pp. 3, 6-7; see also 62 Cong. Rec. 11186, 11189.

In Senate report 591 it was said on this subject (p. 3):

> Following this suggestion (of the President) the committee proposes amendments to the House bill which will authorize the President——
>
> a) To modify rates either upward or downward, within prescribed limits *and in accordance with definite rules laid down by Congress* so that the rates may at all times conform to existing conditions.

One of the rules subsequently adopted and carried forward into the tariff act of 1930, which petitioner seeks now to avoid, is that changes in duty shall be based on differences in *costs of production* for "a representative period."

Petitioner also argues (p. 24) that under respondent's contention a foreign article "would enjoy *an advantage in competition with the* domestic article" which the commission and President would be powerless to prevent. This statement necessarily assumes that the law directs the commission and the President to act in order to offset every "advantage in competition with the domestic article." The conclusion is erroneous, for the purpose of the law is to equalize differences in "costs of production."

62 Cong. Rec. 11186, 11189, cited by petitioner (p. 21), relates to discussion in the Senate on the then proposed section 315, tariff act of 1922, which at that time read in part as follows (p. 11162):

> Sec. 315 (a). That in order to regulate foreign commerce of the United States and put into effect the policy of Congress intended, whenever the President, upon investigation of the *difference in conditions of competition in trade in the markets of the United States* . . . shall find it thereby shown that the duties fixed in this act do not equalize *said differences in conditions of competition.* . . .

This "yardstick," namely, "differences in conditions of competition," is practically the same as petitioner now contends for. However, Congress refused to adopt it; for, as shown on page 11189, Senator Lenroot proposed that this phrase be changed to differences in "cost of production," because, as he said:

> The determination of differences in cost of production clearly involves the ascertainment of facts, and in the ascertainment of those facts whoever does investigate the subject must take into consideration the same factors.

An amendment to this effect was offered (p. 11197), and the change was subsequently made.

The same requirement exists in the present tariff; that is, a change in duty can be made only when warranted by the *fact* that a difference exists in costs of production. Therefore it follows that such facts may not be distorted by use of an exchange rate in order to secure what petitioner describes as an equalization of advantages in competition.

A statement by Senator Walsh, pertinent to petitioner's argument, is found in 72 Cong. Rec. 11185, as follows:

> No answer whatever thus far, so far as I have been able to discover, has been made to the contention which I advanced, that the power thus delegated, in order to be constitutional, must be subject to review by the courts *in order to determine whether the statute was actually followed or was not followed by the*

legislative officer to whom the power had been delegated.

This is all that respondent asks, namely, a court review to determine whether the statute was actually followed.

The above Congressional history relates to the tariff act of 1922, but subsequent Congressional action even more pertinent is as follows:

As appears in volume XVII, p. 10657, of the report of hearings before the Committee on Ways & Means, 90th Congress, on "Tariff Readjustment, 1929", the Tariff Commission had been asked to submit a statement of the difficulties found in the administration of section 315, tariff act of 1922, and suggestions for remedying the same. In compliance with this request the commission reported on March 30, 1929, under the heading "miscellaneous cost problems" (p. 10660), as follows:

> (c) *Depreciated exchange.* In some countries where the value of money has depreciated in terms of gold it is almost impossible to obtain costs of production which will be representative of *competitive conditions* over a considerable period. This difficulty is diminishing as European currencies are becoming stabilized, but in some countries the variations in the purchasing power of local currency from month to month are still a bar to obtaining reliable cost of production data.

After listing the difficulties, many of which pertained to ascertainment of cost of production, the commission stated (p. 10662):

> 1) Changes in tariff rates should be based upon *differences in competitive conditions* in the United States and the principal competing country or countries. In determining *competitive conditions* the President, insofar as he finds it practicable, should take into consideration the following factors:
>
> a) Cost of production for similar competing articles. . . .
>
> . . . . . .

d) The invoice price of imported articles which compete with similar products produced in the United States. . . .

h) Unstable currencies. . . .

k) Advantages granted to a foreign producer by a foreign government or by a person, partnership, corporation, or association in a foreign country. . . .

m) Any other advantage or disadvantage in competition.

A proposed amendment to section 315 was also submitted (p. 10662), and it was therein provided that changes should depend upon "the *differences in conditions of competition in the principal market or markets of the United States,*" of the domestic and the foreign article.

On May 12, 1929, HR 2667 was introduced, providing, as suggested by the Tariff Commission, that changes in duties should be based on "differences in conditions of competition in the principal markets of the United States." House report 7, 71st Cong., 1st sess., p. 160.

Despite this recommendation, which as shown above was similar to the one rejected in 1922, Congress readopted in section 336 the controlling factor of section 315, namely, "*differences in costs of production.*"

In view of the commission's statement that depreciated exchange made it difficult to ascertain "costs of production which will be representative of *competitive conditions* over a considerable period," it is significant that Congress did not adopt as a criterion the "differences in conditions of competition," but retained the former basis, namely, "differences in costs of production." It is also significant that the following portions of section 315 were not materially changed, but merely rearranged in section 336:

Sec. 315 (c). That in ascertaining the differences in costs of production . . . the President, insofar

as he finds it practicable, shall take into consideration . . . (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Sec. 336 (e). In ascertaining under this section the differences in costs of production, the commission shall take into consideration, insofar as it finds it practicable: . . . (2) (c) other relevant factors that constitute an advantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

Thus it may be seen that Congress did not give the President, as recommended by the commission (p. 10662), "a broader base for determining changes in rates of duty than is given by the present law," and specifically refused to adopt as a base the "differences in competitive conditions." Therefore, the test provided by Congress, namely, "the differences in cost of production," is controlling, and the commission may not substitute its own economic theories as to "the present or probable future invoice values in terms of dollars" (R. 24) for this test. This would be an adoption of the principle of "differences in competitive conditions," which Congress rejected.

In *Norwegian Nitrogen Products Co. v. United States*, 288 US 294, 314-5, this court, in construing section 315, tariff act of 1922, gave consideration to the fact that the work of the Tariff Commission was continued by section 336 of the act of 1930. In the present case, Congressional action in another matter is of interest.

On January 26, 1933, the Committee on Ways & Means, 72d Congress, 2d session, held hearings on HR 13999, introduced by Mr. Hill. The report of these hearings is entitled "Equalization of tariff duties by compensation for depreciation of foreign currency," and as shown by

the report (pp. 1-2) the bill provided for a compensating tax based upon the amount of depreciation of foreign currency.

Mr. John R. Hopkins, special assistant to the Secretary of the Treasury, appeared before the committee and opposed enactment of the bill. He also recommended that other legislation be adopted (p. 7) which would permit the Tariff Commission to conduct investigations of foreign and domestic articles and (p. 8) to report to the President its recommendations for changes in duty *to offset depreciated foreign currency*. Following his statement of the proposed legislation, the report reads in part as follows (pp. 9-10):

> Mr. Hill: It is rather difficult to follow, of course, the statement as complex as the one you have made this morning and retain all the points you have brought out. But as I get it, such a plan as you suggest would mean delegating to the Tariff Commission much larger duties than that commission now exercises, and giving the commission, together with the President, a great deal more authority and power in the matter of adjusting tariffs on a flexible basis. That is briefly the effect of your suggested plan, is it not?
>
> Mr. Hopkins: Yes, it will throw, of course, additional duties on the Tariff Commission.
>
> Mr. Hill: It practically delegates the whole power of levying tariffs and compensating duties to the Tariff Commission and the President?
>
> Mr. Hopkins: It sets forth a rule under which they must operate in determining the duty necessary to compensate. . . .
>
> Mr. Hopkins: Many of the investigations the commission is carrying on at the present time *under section 336* of the tariff act are really made necessary through depreciated currencies. I do not know what their number is, but I dare say quite a substantial portion of their investigations are really under sec-

tion 336 on depreciated currencies, *without the possibility, under section 336, to adequately correct the present situation.*

This additional power to the Tariff Commission and the President, which would have had the effect of permitting changes in duties because of depreciated currency, has not been granted by Congress. Despite this, the commission in the instant case adopted the principle of this proposed, but rejected, legislation, and based its recommendation to the President not on the difference in costs of production, as required by section 336, but on its attempted adjustment of such cost through use of erroneous exchange rates.

During this same session of Congress five other bills were introduced, whose purpose was, by one method or another, to adjust duties because of depreciated foreign currency. None of them was enacted. See Cong. Rec., 72d Cong., 2 sess., p. 718, HR 13790; p. 2555, HR 14413, 14428; and p. 2640, HR 14435.

Also, during the first session of this Congress 15 bills "to equalize tariff duties by compensation for depreciation in foreign currencies" were introduced but never enacted: HR 8544-7, 8550-7, Cong. Rec. 2930; 8640, Cong. Rec. 2971; 8688, Cong. Rec. 3156, and 8752, Cong. Rec. 3293.

Notwithstanding the failure of these repeated efforts to implement the Tariff Commission with a new yardstick the action of the commission here was a frank attempt to proceed without such an aid, and to adjust duties upon the basis of depreciated currency, contrary to the method specified in section 336.

XIV) **Effect of petitioner's contention on validity of section 336**: The action of the President and the commission in changing rates of duty is in its nature legislative. Therefore, if this power has been constitutionally dele-

gated it must be presumed, as was said in *Cincinnati v. Clinton County,* 1 Ohio State 88, that section 336 does not delegate "power to make a law which necessarily involves a discretion as to what it shall be," but merely confers "authority as to its execution, to be exercised under and in pursuance of the law." This statement of principle was cited with approval in *Field v: Clark,* 143 US 649, 633; *Hampton v. United States,* 276 US 394, and *Panama Refining Co. v. Ryan,* 293 US 388. Also, the validity of section 336 must depend upon whether Congress stated its purpose and provided "the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits." *United States v. Rock Royal Co.,* 307 US 533, 574. To the same effect see also *Panama Refining Co. v. Ryan,* supra; *Mutual Film Corp. v. Industrial Commission,* 236 US 230; *Interstate Commerce Commission v. Goodrich Transit Co.,* 224 US 194, 214, and *Field v. Clark,* supra.

As to the limitations on such standards when laid down by the legislature, it was said in *St. Louis Merchants Bridge Terminal Railway Co. v. United States,* 188 F. 191, 195, that the legislature "cannot delegate its legislative power, *its power to exercise the indispensable discretion to make, to add to, to take from, or to modify the law.*"

This principle is also concisely stated in editorial annotations to *Panama Refining Co. v. Ryan,* supra, 79 L. ed. 488, as follows:

> If, by the terms of an act, it is to be effective only in case a commission deems the act expedient, then there is a delegation of legislative power, and the act is void. Such a determination of legislative expediency can be made by the legislature alone.
>
> "An act of legislature which vests in such officers the discretion to determine what the law is, or to

apply it to one and refuse its application to another in like circumstances, is void as an unwarranted delegation of legislative authority."

Concededly, by section 336 Congress stated its purpose, namely, that duties should be adjusted either upward or downward so as "to put into effect the policy of this Act, intended" (section 336-a) which is (preamble, tariff act of 1930) "to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes."

As to the required "standards" Congress clearly stated in section 336 that the changes in rates of duty should be made in accordance with *the differences in costs of production* so as to equalize these differences.

Clearly the power to change a rate of duty in accordance with such a policy may be properly delegated. However, it is also true that the legality of the delegation depends upon whether sufficient "standards," are set forth, or as was said in *Hampton v. United States*, supra, an "intelligible principle" is prescribed.

Under petitioner's theories here, no such standard or principle exists, for in effect it is claimed that the commission is privileged to use any rate of exchange it wishes in ascertaining the "differences in cost of production." Such power necessarily carries with it the discretion to determine whether in any given case duties shall be raised or lowered, or greatly increased or slightly increased, or lowered to a large extent or to a small extent, for if unrestricted discretion may be exercised by the commission in selection of a rate of exchange to be used in converting foreign currency, then by such selection the commission may obtain a wide range of assumed foreign costs of production, and of course obtain corresponding differences in

the cost of producing the foreign and the domestic articles.

Such a privilege corresponds to that held by the President under the National Industrial Recovery act, as to which it was said in *Panama Refining Co. v. Ryan*, supra, (p. 415):

> It (section 9-c of the National Industrial Recovery act) establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, *it gives to the President an unlimited authority to determine the policy and lay down the prohibition, or not to lay it down, as he may see fit.* . . .

Also, in *Wichita Railroad & Light Co. v. Public Utilities Commission*, 260 US 48, this court said (p. 59):

> In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its actions.

If the petitioner's argument is accepted, it follows that the commission or the President has the power under section 336 "to determine what the law is, or to apply it to one and refuse its application to another in like circumstances." If this is true, section 336 is an unconstitutional delegation of legislative power because "Congress failed to set up a standard for the President's action." *Panama Refining Co. v. Ryan*, supra, p. 415.

As opposed to this respondent contends that the commission should base its findings as to differences in costs

of production upon the actual foreign costs on the dates of exportation as evidenced by invoice prices or values. Under this construction, foreign cost may be ascertained in a definite manner, and section 336 becomes a valid delegation of legislative power. Therefore the decision of the court below should either be affirmed on the grounds stated therein or the proclamation held to be invalid because based upon an unconstitutional statute.

XV) **Other points in petitioner's brief:** Petitioner states (p. 2) that the first question is whether the Customs Court has power to review the *facts and reasoning* upon which the Tariff Commission based its recommendation to the President, and if *dissatisfied* to declare the proclamation void. If this were the real issue the decision below should probably be reversed, but it is not. A study of the decision of the lower court and of the facts revealed by this record clearly shows that the court did not attempt to substitute its judgment for that of the commission, and at no time has respondent contended that this should be done.

With this question as its premise petitioner argues (p. 8) that the court below "had no power to review the facts upon which the Tariff Commission based its recommendation to the President, or to declare the proclamation void because it believed that the commission had erroneously interpreted the tariff act in ascertaining the foreign cost of production." In support of this petitioner asserts (p. 14) that the prescribed forms of legislation were regularly observed because the preliminary external requirements of notice, hearing and report to the President were complied with. In other words, it is petitioner's position (p. 14) that so long as the commission ostensibly follows section 336 "there can be no judicial review." Such an argument is specious, for it ignores the fact that no law can be changed by an agent of the legislature unless the

prescribed conditions are complied with. Here Congress prescribed that certain things should be done, among them being ascertainment of costs of production in a specific manner. Therefore compliance with such conditions is prerequisite to a valid investigation.

In support of its argument petitioner cites (p. 13): *United States v. Chemical Foundation*, 272 US 1, 14-15; *Dakota Central Tel. Co. v. South Dakota*, 250 US 163, 184; *Monongahela Bridge v. United States*, 216 US 177, 195; *The Philadelphia & Trenton R. R. Co. v. Stimson*, 14 Pet. 448, 458; *Martin v. Mott*, 12 Wheat. 19, 30, and *Sterling v. Constantin*, 287 US 378, 399, as holding:

> That where Congress has empowered a public officer to take some specified legislative action when, in his judgment, such action is necessary to carry out the policy of Congress, the judgment of the officer as to the existence of facts making the action necessary is not subject to judicial review.

Even assuming that the above statement is a correct interpretation of these decisions, the principle is not applicable, for here Congress did not pretend to delegate such power to the commission, but on the contrary prescribed with sufficient exactness the only *facts* which the commission might consider. Congress clearly did not empower the commission to take legislative action when *in its judgment* such action was necessary. Furthermore, neither did Congress empower the President to proclaim changes in duties "when, in his judgment, such action was necessary," but specifically limited him in the exercise of his judgment to the facts "shown by such investigation" of the commission. Therefore a judicial review is proper to determine whether those facts were the ones required by section 336 and whether they had been ascertained in the manner provided for.

The decisions referred to above are not quite as definite as petitioner suggests, in holding that no judicial review exists under such circumstances.

a) *United States v. Chemical Foundation*, supra, p. 14, is authority for the fact that, "in the absence of clear evidence to the contrary, courts presume that public officers have properly discharged their official duties," and that "under this presumption it will be taken that Mr. Polk (the public officer) acted upon knowledge of the material facts," and "the validity of the reasons stated in the order, or the basis of fact on which they rest, will not be reviewed by the courts." In the present case respondent has provided "clear evidence to the contrary." Therefore the decision is not applicable.

b) The second case, *Dakota Cent. Telephone Co. v. South Dakota*, supra, p. 184, related to actions taken by the President which were authorized by joint resolution of Congress during war, and it was there held that no judicial review existed to correct alleged mistakes or wrongs arising from asserted abuse of discretion. This decision is of no interest here.

c) The general rule stated in the *Monongahela Bridge Co.* case, supra, is likewise inapplicable, for it was there said (p. 194) that it did "not appear that the Secretary disregarded the facts, or that he acted in an arbitrary manner, *or that he pursued any method not contemplated by Congress.*" Here this is the very point involved; therefore the following language from the *Monongahela* case is applicable (p. 194):

> Except that when it (Congress) provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that executive officers conform their action to the mode prescribed by Congress.

d) The *Philadelphia & Trenton R. R. Co.* case, supra, was an action for violation of a patent, and merely holds (p. 458) that public officers are presumed to have performed their proper official duties, *until the contrary is proved*, and that where a patent has been granted it is prima-facie evidence that the proofs were regularly made and were satisfactory, and that no tribunal is at liberty to reexamine or controvert the sufficiency of such proof. The contrary is proved here.

e) *Martin v. Mott*, supra, related to an act of Congress authorizing the President to call forth the militia, and held that this power was exclusively vested in him and that his decision was conclusive. In rendering this decision the court stated (p. 30):

> Whenever a statute gives discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.

Section 335 does not grant such discretionary power.

f) The remaining decision, *Sterling v. Constantin*, related to the exercise by a state governor of discretion in determining whether an exigency requiring military aid had arisen, and it was there held that the executive's decision was conclusive.

At page 15 it is argued that the court below failed to observe the distinction between administrative orders directed against particular persons, which are subject to impeachment if they are without evidence to support them, and legislative action taken by a public officer pursuant to authority delegated to him, which is not subject to impeachment if the prescribed forms of legislation have been observed. This assumes that the court below based its decision upon a finding that there was no evidence to

support the proclamation, but such is not the case. The court found that ascertainment of cost of production for the selected *representative period* was one of the "prescribed forms" and that, as the commission had not ascertained this fact, the proclamation was void.

Although it is repetitious to so state, this again illustrates the conflicting contentions here. Petitioner's argument is based upon the assumption that so long as the commission gave notice, held hearings, and reported to the President, no inquiry may be had as to whether the formula prescribed by section 336 was followed. As opposed to this, respondent contends that the court may determine whether costs of production and duties necessary to equalize any differences in costs were ascertained in the manner provided for by statute.

Petitioner also cites *Pacific States Box Co. v. White*, 296 US 176, 186, as authority for the contention stated above. This decision relates to the exercise of public power by an agent of the legislature and merely holds that existence of facts justifying the action is presumed. *Adams v. Nagle*, 303 US 532, is also cited. The pertinent portion of this decision is as follows (p. 542):

> Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except upon certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; but if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he exceeded his jurisdiction by reason either of fact or law which induced his conclusion. Plainly therefore, the respondents are wrong in asserting that, as the facts set forth in their bill charge the comptroller with an error of law, he exceeded his authority.

Application of this rule to the present case requires the same conclusion as was reached by the court below, for section 336 does not vest discretion in the commission to act in the light of whatever facts it chooses to select, but prescribes and defines specific conditions under which changes in duty may be recommended. Further, the President is not authorized or directed to exercise his judgment as to the costs of production, but only his judgment as to whether the rates prescribed "are shown by such investigation of the commission" to be necessary. Therefore if the commission does not ascertain the facts specified in section 336 the President's proclamation is void.

As a second point petitioner argues (p. 18) that the commission committed no error in ascertaining foreign cost of production and that (p. 21) the decision below to a large extent nullifies the intention of Congress in enacting the flexible-tariff provision.

This argument is based upon the theory that the purpose of section 336 is to allow changes in duty which will equalize the differences in costs of production at the time the change becomes effective. However desirable this might be, it is indisputable that Congress required the commission to base its recommendation for increased duty upon costs of production ascertained, as in this case, by the "weighted average of the invoice prices or values for a *representative period*," and that when such costs are ascertained for one period and converted into dollars by the use of a rate of exchange in effect during some other period, the resultant dollar value is not the value for that representative period, and therefore does not show the statutory costs for that period.

Perhaps Congress should have delegated unrestricted power to the commission to ascertain the need for changes in duty in any manner it saw fit, but this was not done; and petitioner's argument must fail, for it evades the fact

that Congress in defining "cost of production" (sec. 336 (h) (4)) prescribed that, "when applied to either a foreign or domestic article, (it) includes *for a period which is representative of conditions in production of the article*" certain facts. Therefore when domestic costs are ascertained for one period, foreign costs may not be ascertained for an entirely different period, and foreign cost of production is certainly not ascertained "for a representative period" if such costs are converted into dollars by use of a rate of exchange which bears no relation to that period. There is only one way the commission's actions may be justified, and that is to disregard the requirements of section 336 and hold that Congress granted power to the commission and the President to change duties whenever in their judgment changes are required. This, however, is not the law.

Much is said by petitioner in apprehension that under the decision below the commission and the President would be effectively prevented from carrying out the purpose of the flexible-tariff provision in almost every case where currency fluctuation is a major factor (p. 24). That is not so. *The instant case is the only one where the commission utilized the method adopted here.* Also, the remedy, if any be required, is by legislative action such as was proposed in the hearings on HR 13999 referred to above, and by the commission in 1929 prior to enactment of section 336.

Petitioner also argues (p. 20) that, if the commission is required to convert foreign costs into dollars at the rates of exchange which prevailed during the period used to ascertain the foreign costs, "it will be utterly unable to perform its function of determining what change of duty will equalize the differences in costs of production at the time when the change becomes effective." As to this it is of interest to note the commission's action in another matter.

As shown by report 71, second series, entitled "Fish packed in oil," the commission recommended a change in duty shown necessary by differences in costs of production of tuna imported from Japan. This report to the President was dated October 30, 1933, when the yen was valued at .288 (Treasury Decision 46707), and it stated that the commission had selected the year 1932 as the representative period and had ascertained foreign costs of production during the 9 months ending August 31, 1932; also that (p. 2):

> The costs of production (as evidenced by invoice prices) of Japanese tuna, packed in oil, in terms of dollars, are affected by the rate of exchange of the yen for the dollar. Prior to December 15, 1931, the yen was substantially at par. Throughout the year 1932 the exchange value of the yen was materially depreciated with a general downward trend. *The invoice prices have been converted to dollars at the rate of exchange at the time of the respective shipments,* averaging about 55 per cent of par.

In that case the commission found that a raise of duty from 30 to 45 percent ad valorem was adequate to offset differences in production costs, but had the commission selected as a representative period the year 1931 (which was also covered by its investigation) it could have determined, by use of the rate of exchange in effect at the time of the report, that a much greater change in duty was required. (See values stated at page 20 of said report 71). *In other words, under the plan petitioner advocates the law becomes what the commission desires it to be, and not what Congress specified.*

Petitioner makes the following unsupported statement (p. 21):

> The Tariff Commission informs us that in the case of approximately 35 investigations made by the Commission under section 336, currency fluctuation has

been an important element in determining the action recommended. Increases in duty have been proclaimed on 13 articles when the currency of the principal competing country was below par in terms of United States dollars. In the case of 8 of these 13 articles, Japan was the principal competing country and in each instance the increase was found necessary after Japan went off the gold standard.

Respondent does not concede the propriety of this reference to matter which is not in evidence and which may not be judicially noticed. In any case it should be given very little consideration, when viewed in the light of printed commission reports of which judicial notice may be taken. *United States v. Best*, 24 CCPA 220, reviewing authorities. Counsel for respondent has examined 62 of the entire 67 reports made to the President under section 336 (see appendix, pp. xxii-iv), in order to ascertain whether the procedure adopted here was used in other investigations. The remaining five reports are not available to counsel, but, as shown by the Presidential proclamations, three of them—No. 5, wire netting; No. 6, wood flour, and No. 7, maple sugar—do not relate to Japanese merchandise, but to German, Norwegian and Canadian products. (See Presidential proclamations, TD 44602, TD 46604 and TD 44605.) The other two—No. 10, wool floor coverings, and No. 11, ultramarine blue—pertain to commodities where no presidential proclamation was issued.

Of these 67 investigations only eleven related in whole or in part to Japanese commodities, as follows:

No. 57, crab meat
No. 63, shoes
No. 71, fish in oil
No. 77, grass rugs
No. 79, cotton fish nets
No. 81, tooth brushes
No. 84, clams

No. 107, frozen swordfish
No. 108, wool knit gloves
No. 112, cotton cloth
No. 113, slide fasteners

a) As to crab meat (report 57) the commission found (p. 2) that the existing duty should not be changed. The "representative period" was from November, 1930 to November, 1931.

b) On shoes (report 63) the weighted average of the invoice prices were used as evidence of cost of production (p. 27), and although the exchange value of the yen decreased during the representative period from 49 to 20 cents (p. 14) the commission converted the prices *at the rates of exchange in effect on the dates of exportation* (p. 14).

c) As to fish in oil (report 71) *the same procedure was followed*, even though the value of the yen decreased during the representative period (January to August, 1932) from approximately 49 cents to 23 cents (p. 2-3).

d) In respect to grass rugs (report 77) costs of production were not ascertained, because of "disturbed conditions of production in the United States and foreign countries."

e, f) The same conclusion was reached as to cotton fishing nets (report 79, p. vi) and toothbrushes (report 81, p. vi). In this latter report a statement appears which contradicts petitioner's claim (p. 23 of brief) that "depreciation of the currency of a country in terms of foreign exchange has, at least over limited periods of time, a relatively small influence upon the domestic value of that currency and upon the domestic costs of production, expressed in terms of that currency." In this report the commission states (p. 7):

> The average unit value of the imports of toothbrushes of both groups fell abruptly in 1932 and the

early months of 1933, partly as a result of the depreciation of the Japanese yen. The average exchange rate of the yen for 1932 was 28.1 cents as compared with 48.8 cents (substantially par) in 1931, a decrease of 42 percent.

g) Report 84 is the one involved in the instant case on clams.

h) In reference to frozen swordfish (report 107) the commission selected June 1, 1933, to May 31, 1935, as the representative period, and stated (p. 2) that the weighted average invoice values were accepted as evidence of cost of production, and that "*practically all of the importations were invoiced in money of the United States.*" This serves to illustrate the fallacy of petitioner's argument that the decision below renders section 336 largely useless (p. 21), and that "in every investigation . . . foreign costs, as determined in foreign currency, must be translated into dollars for purposes of comparison with domestic costs" (p. 20). Foreign merchandise is frequently invoiced in American dollars, and in fact *the very importation covered by this petition was so invoiced* (R. 5). As to such invoices, all of petitioner's argument must fail unless it be held that the commission, after ascertaining in United States money the foreign costs through invoice prices, is privileged to revise such costs in any manner it chooses.

i) On wool knit gloves (report 108), the year 1935 was selected as the representative period. Invoice prices were accepted as evidence of foreign cost of production, and "were converted to United States dollars at the *current rate of exchange at the time of shipment*" (p. 3).

j) On cotton cloth (report 112) invoice prices from December, 1934 to April 1, 1935 were accepted (p. 4), and no statement was made in respect to conversion of currency. So presumably the commission followed its usual procedure and converted at the rates shown on the invoices.

k) The remaining report on Japanese articles is No. 113, on slide fasteners. Invoice prices for the last six months of 1935 were used, and were converted at the "*current rate of exchange at the time of shipment*" (p. 3).

In referring to these reports, counsel has assumed that the court may take judicial knowledge of such public documents, as held in *United States v. Best*, 24 CCPA 220, supra, and may thus observe that the statement by petitioner (pp. 2-3) as to the commission's actions in investigating Japanese products does not have the relevance or significance imputed by petitioner.

The balance of the commission's investigations related to merchandise from Austria, Bahama Islands, British India, Canada, Cuba, Czechoslovakia, France, Germany, Italy, Mexico, Morocco, Netherlands, Norway, Soviet Union, Switzerland, and United Kingdom. The reports are listed in the appendix, and as stated above all except five, which are not available, have been examined, and it has been found that, although invoice prices were frequently used as evidence of cost of production, these prices were not converted into dollars by use of an average exchange rate for a different period of time, as was done here, in report 59 on barley malt from Canada, but in that report no change in duty was recommended.

In reports 31 on boots and shoes, 34 on pens, and 36 on gauge-glass tubes, the commission stated that it was unable to ascertain the necessary facts, because of depreciated foreign currency, and consequently did not recommend changes in duty.

In report 64 on sperm oil the foreign costs were adjusted because of depreciated currency.

In report 32 on lumber the foreign costs were converted at the par value of the Canadian dollar even though a subsequent depreciation had occurred.

The above facts show that affirmance of the decision below will not, as stated by petitioner, render section 336 largely useless. They also serve to indicate the incompleteness of the statement (p. 23, petitioner's brief) that:

> The Tariff Commission informs us that in the case of approximately 35 investigations made by the commission under section 336, currency fluctuation has been an important element in determining the action recommended.

And they establish that the commission's action in the present case was unique.

On page 25 petitioner states that even if the construction placed on section 336 (e) (2) (a), by the court below, ie., that "the commission may accept as evidence of the cost of production of a foreign article the weighted average of the invoice prices or values *in United States currency for a representative period*," is correct, yet the provision is permissive in character, and therefore there was no violation of the statute. This argument is stated as follows (p. 25, emphasis added):

> The provision of section 336 (e) (2) *for use of the weighted average* of invoice prices or values for a representative period is permissive in character; the commission "may" accept such an average as "evidence" of the foreign costs of production "*insofar as it finds it practicable.*"

An examination of the statute shows that the above argument is not sound. Section 336 (e) provides that:

> In ascertaining under this section *the differences in costs of production*, the commission shall take into consideration, *insofar as it finds it practicable* . . .

Clearly the words "insofar as it finds it practicable," relate to ascertainment of *differences* in costs of production, and not, as stated by petitioner, to the acceptance of invoice prices as evidence of cost of production. There-

fore petitioner's further statement (p. 25) that, "the commission, having found that it was not *practicable* to use this method of conversion (R. 14), was under no statutory compulsion to do so," is unsupported by the statute.

XVI) **Conclusion**: It is respectfully submitted that the judgment of the court below should be affirmed on the grounds stated herein, or on the ground that the proclamation is invalid because based upon an unconstitutional statute.

San Francisco, April 11, 1940.

FRANK L. LAWRENCE
GEORGE R. TUTTLE
Attorneys for Appellee

(APPENDIX FOLLOWS)

Appendix

A) EXTRACTS FROM TARIFF ACT OF JUNE 17, 1930, C. 497, 46 STAT. 590, 19 USC 1336:

Sec. 336. Equalization of Costs of Production.

(a) *Change of Classification or Duties.*—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differ-

ences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

(b) *Change to American Selling Price.*—If the Commission finds upon any such investigation that such differences can not be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

(c) *Proclamation by the President.*—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

(d) *Effective Date of Rates and Changes.*—Commencing thirty days after the date of any presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in basis of value specified in the report of the commission shall take effect.

(e) *Ascertainment of Differences in Costs of Production.*—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, in so far as it finds it practicable:

(1) *In the Case of a Domestic Article.* (A) The cost of production as hereinafter in this section defined; (B) transportation costs and other costs incident to de-

livery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

(2) *In the Case of a Foreign Article.* (A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for representative period and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets); (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

(f) *Modification of Changes in Duty.*—Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes.

(g) *Prohibition Against Transfers from the Free List to the Dutiable List or from the Dutiable List to the Free List.*—Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any

paragraph of Title I of this Act, or in any amendatory Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such article shall exceed the maximum ad valorem rate so specified.

(h) *Definitions.*—For the purpose of this section:

(1) The term "domestic article" means an article wholly or in part the growth or product of the United States; and the term "foreign article" means an article wholly or in part the growth or product of a foreign country.

(2) The term "United States" includes the several States and Territories and the District of Columbia.

(3) The term "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions).

(4) The term "cost of production," when applied with respect to either a domestic article or a foreign article, includes, for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in its production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

Sec. 402. Value.

(a) *Basis.*—For the purposes of this Act the value of imported merchandise shall be—

(1) The foreign value or the export value, whichever is higher;

(2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the United States value;

(3) If the appraiser determines that neither the foreign value, the export value, nor the United States value can be satisfactorily ascertained, then the cost of production;

(4) In the case of an article with respect to which there is in effect under section 336 a rate of duty based upon the American selling price of a domestic article, then the American selling price of such article.

* * * * * * *

(c) *Foreign Value.*—The foreign value of imported merchandise shall be the market value or the price *at the time of exportation of such merchandise* to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

(d) *Export Value.*—The export value of imported merchandise shall be the market value or the price, *at the time of exportation* of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities

and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * * * *

(g) *American Selling Price.*—The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.

Sec. 481. Invoice—Contents.

(a) *In General.*—All invoices of merchandise to be imported into the United States shall set forth * * *.

(5) The purchase price of each item in the currency of the purchase, if the merchandise is shipped in pursuance of a purchase or an agreement to purchase;

(6) If the merchandise is shipped otherwise than in pursuance of a purchase or an agreement to purchase, the value for each item, in the currency in which the transactions are usually made, or, in the absence of such value, the price in such currency that the manufacturer, seller, shipper, or owner would have received, or was willing to receive, for such merchandise if sold in the ordinary course

of trade and in the usual wholesale quantities in the country of exportation.

Sec. 484. Entry of Merchandise.

(b) *Production of Certified Invoice.*—No merchandise shall be admitted to entry under the provisions of this section without the production of a certified invoice therefor, except that entry may be permitted if—

(1) The collector is satisfied that the failure to produce such invoice is due to causes beyond the control of the person making entry;

(2) Such person makes a verified declaration in writing that he is unable to produce such invoice and (A) files therewith a seller's or shipper's invoice, or (B) if he is not in possession of a seller's or shipper's invoice files therewith a statement of the value, or the price paid, in the form of an invoice; and

(3) Such person gives a bond for the production of such certified invoice within six months.

The Secretary of the Treasury may by regulations provide for such exceptions from the requirements of this subdivision as he deems advisable.

Sec. 485. Declaration.

(a) *Requirement—Form and Contents.*—Every consignee making an entry under the provisions of section 484 of this Act shall make and file therewith, in a form to be prescribed by the Secretary of the Treasury, a declaration under oath, stating—

(1) Whether the merchandise is imported in pursuance of a purchase or an agreement to purchase, or whether it is imported otherwise than in pursuance of a purchase or agreement to purchase;

(2) That the prices set forth in the invoice are true, in the case of merchandise purchased or agreed to be purchased; or in the case of merchandise secured otherwise than by purchase or agreement to purchase, that the statements in such invoice as to value or price are true to the best of his knowledge and belief.

Sec. 522. Conversion of Currency.

(b) *Proclaimed Value Basis of Conversion.*—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of enactment of this act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

B) EXTRACT FROM TARIFF ACT OF SEPTEMBER 21, 1922, C. 356, 42 STAT. 858, 922, 19 USC 121, 154:

Sec. 315. Tariff Act of 1922.

(a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall by such investigation ascertain said differences and determine and proclaim the changes in

classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of

this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2) and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal

markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results sub-

stantially equal to those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

C) REPORTS TO THE PRESIDENT BY THE UNITED STATES TARIFF COMMISSION UNDER SECTION 336, TARIFF ACT OF 1930, SECOND SERIES.

Report No.	Subject	Chief competing country
5	Woven wire fencing and netting	Germany
6	Wood flour	Norway
7	Pigskin leather	Austria
8	Hats, bonnets, and hoods of straw	Italy
9	Maple sugar and sirup	Canada
10	Wool floor coverings	
11	Ultramarine blue	
12	Smokers' articles	France
13	Edible gelatin	Netherlands
14	Fourdrinier wires, woven-wire cloth, etc.	Germany
15	Wool-felt hat bodies and hats	Italy
20	Pipe organs	Canada
21	Cheese	Various European
22	Olive oil	Italy
23	Iron in pigs and iron kentledge	Germany, etc.
24	The bovine species	Not stated
25	Dried egg products	China
26	Hemp cordage	Italy
27	Bells, chimes, and carillons	Germany
28	Bent-wood furniture	Czechoslovakia
31	Boots and shoes	United Kingdom, and Czechoslovakia
32	Lumber	Canada
33	Cylinder, crown, and sheet glass	Belgium
34	Pens	United Kingdom
35	Crin vegetal, flax upholstery tow, etc.	Morocco
36	Gauge-glass tubes	United Kingdom
37	Feldspar	Canada.
38	Cement	Belgium
39	Fresh vegetables	Mexico and Cuba
40	Pineapples	Cuba
47	Umbrellas and umbrella frames and skeletons	France
48	Infants' wool knit outerwear	United Kingdom

Report No.	Subject	Chief competing country
49	Furniture of wood	Canada
50	Silicon aluminum, aluminum silicon, etc.	Switzerland
51	Sponges	Cuba and Bahama Islands
52	Inedible gelatin, glue, glue size, etc.	Germany
53	Cocoa-fiber mats	British India
54	Optical fire-control instruments	Germany
55	Precision drawing instruments and parts	Germany
56	Upholsterers' nails, chair glides, etc.	Germany
57	Crab meat	Japan
58	Folding rules, aluminum and wooden	Germany
59	Barley malt	Canada
60	Blown-glass tableware	Czechoslovakia
63	Rubber-soled and rubber footwear	Japan and Czechoslovakia
64	Sperm oil and spermaceti wax	Canada
66	Agricultural hand tools	Germany
68	Cotton velveteens and velvets	Germany
71	Fish packed in oil	Japan and Norway
73	Sugar	Cuba
74	Candied, crystallized or glace fruits	France
75	Meat and food choppers	Czechoslovakia
76	Cotton ties	Germany
77	Grass and straw rugs	Japan
78	Pins	Germany
79	Cotton fishing nets and nettings	Japan and Holland
80	Cut flowers	Canada and Netherlands
81	Tooth and other toilet brushes	Japan
82	Laminated products	Germany
84	Canned clams	Japan
98	Beer	Canada
107	Frozen swordfish	Japan
108	Wool knit gloves and mittens	Japan
110	Plate glass	Belgium
112	Cotton cloth	Japan
113	Slide fasteners and parts thereof	Japan
122	Dressed or dyed furs	Soviet Union

FILE COPY

Office - Supreme Court, U. S.
APR 26 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 613

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE S. BUSH & CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

GEORGE R. TUTTLE,

INDEX.

TABLE OF CASES CITED.

	Page
Chisholm v. *Georgia*, 2 Dall. 431	8
Bakelite Corporation, Ex parte, 279 U. S. 438	4
Federal Radio Commission v. *Nelson Brothers*, 289 U. S. 266	4
Norwegian Nitrogen Products Co. v. *United States*, 288 U. S. 294	4
O'Donoghue v. *United States*, 289 U. S. 516	4, 7
Old Colony Trust Co. v. *Commissioner*, 279 U. S. 716	4
Williams v. *United States*, 289 U. S. 553	4, 7

STATUTES CITED.

Tariff Act of 1922, Section 316	4
Tariff Act of 1930, Section 501, 19 U. S. C. 1501	1, 2, 5
Tariff Act of 1930, Section 520(1), 19 U. S. C. 1520	9
Constitution of the United States, Article III	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 613

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE S. BUSH & CO., INC.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

By permission of the Court this supplemental brief, which is confined to a question of jurisdiction, is being filed. The proceedings contemplate a review of a decision of the United States Court of Customs and Patent Appeals relating to the proper dutiable value of imported merchandise. The action was originally commenced by the respondent's appeal to the United States Customs Court (authorized by section 501, tariff act of 1930, 19 U. S. C. 1501) for a review of the decision of the United States Appraiser of merchandise at the port of Seattle as to the proper dutiable value of such merchandise. In reviewing this appraisement a single judge of said United States Customs Court affirmed the appraised value. Thereafter his decision was reviewed by a division of three judges of

said court and his findings affirmed. Subsequently as authorized by said section 501 an appeal was taken to the Court of Customs and Patent Appeals "upon a question of law only". After decision by that court certiorari was granted. The statute governing the procedure in the Customs Court referred to above, and granting jurisdiction to the Court of Customs and Patent Appeals in such proceedings is as follows:

> SECTION 501. Notice of Appraisement—Reappraisement.
>
> The collector shall give written notice of appraisement to the consignee, his agent, or his attorney, if (1) the appraised value is higher than the entered value, or (2) a change in the classification of the merchandise results from the appraiser's determination of value. The decision of the appraiser shall be final and conclusive upon all parties unless a written appeal for a reappraisement is filed with or mailed to the United States Customs Court by the collector within sixty days after the date of the appraiser's report, or filed by the consignee or his agent with the collector within thirty days after the date of personal delivery, or if mailed the date of mailing of written notice of appraisement to the consignee, his agent, or his attorney. No such appeal filed by the consignee or his agent shall be deemed valid, unless he has complied with all the provisions of this Act relating to the entry and appraisement of such merchandise. Every such appeal shall be transmitted with the entry and the accompanying papers by the collector to the United States Customs Court and shall be assigned to one of the judges, who shall, after affording the parties an opportunity to be heard, determine the value of the merchandise. Reasonable notice shall be given to the importer and to the person designated to represent the Government in such proceedings of the time and place of the hearing, at which the parties and their attorneys shall have an opportunity to introduce evidence and

to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence. In finding such value affidavits and depositions of persons whose attendance cannot reasonably be had, price lists and catalogues, reports or depositions of consuls, customs agents, collectors, appraisers, assistant appraisers, examiners, and other officers of the Government may be admitted in evidence. Copies of official documents, when certified by an official duly authorized by the Secretary of the Treasury, may be admitted in evidence with the same force and effect as original documents. The value found by the appraiser shall be presumed to be the value of the merchandise and the burden shall rest upon the party who challenges its correctness to prove otherwise.

The judge shall, after argument on the part of any of the interested parties requesting to be heard, render his decision in writing together with a statement of the reasons therefor and of the facts on which the decision is based. Such decision shall be final and conclusive upon all parties unless within thirty days from the date of the filing of the decision with the collector an application for its review shall be filed with or mailed to the United States Customs Court by the collector or other person authorized by the Secretary of the Treasury, and a copy of such application mailed to the consignee, or his agent or attorney, or filed by the consignee, or his agent or attorney, with the collector, by whom the same shall be forthwith forwarded to the United States Customs Court. Every such application shall be assigned by the court to a division of three judges, who shall consider the case upon the samples of the merchandise, if there be any, and the record made before the single judge, and, after hearing argument on the part of any of the interested parties requesting to be heard, shall affirm, reverse, or modify the decision of the single judge or remand the case to the single judge for further proceedings, and shall state its action in a written decision, to be forwarded to the collector, setting forth the facts upon which the

finding is based and the reasons therefor. *The decision of the United States Customs Court shall be final and conclusive upon all parties unless an appeal shall be taken by either party to the Court of Customs and Patent Appeals upon a question or questions of law only within the time and in the manner provided for by section 188 of the Judicial Code, as amended (Section 310, title 28).*

In the light of recent decisions cited below counsel for respondent is inclined toward the view that the present proceedings constitute a "case" within the meaning of Article 3, Section 2 of the Constitution and therefore jurisdiction exists to review the decision of the court below. These decisions are as follows:

Old Colony Trust Company v. *Commissioner*, 279 U. S. 716;

Federal Radio Commission v. *Nelson Brothers*, 289 U. S. 266;

O'Donoghue v. *United States*, 289 U. S. 516;

Williams v. *United States*, 289 U. S. 553.

However, because of the decision of this Court in *Ex Parte Bakelite Corporation*, 279 U. S. 438, and certain language used in *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, counsel considers it his duty to bring to the Court's attention the question of whether jurisdiction exists, for the *Bakelite* case is the only ruling by this Court as to the character of a customs appeal.

The *Norwegian Nitrogen Products Company* case involved the issue of whether the United States Tariff Commission, in investigating the differences in costs of production of certain merchandise as authorized by section 315, tariff act of 1922, had given the petitioner the hearing prescribed by that law (p. 297). In deciding the point this Court reviewed the procedure and history of the Tariff

Commission and also referred, by way of illustration, to certain proceedings authorized by section 501 of said act which corresponds with section 501, tariff act of 1930. As to such reappraisement proceedings in the United States Customs Court this Court said (p. 315-6):

> To the external aids that are drawn from history and analogy and administrative practice there is to be added another that may be said to be internal, the aid to be derived from the wording of related sections. In the same tariff act that makes provision in these general words for a hearing by the Commission as a step in the development of the process of legislation, there is another section prescribing the remedy available to an importer after the legislative process has been completed, and the question is whether the merchandise has been properly appraised. Act of September 21, 1922, c. 356, sec. 501, 42 Stat. 966; 19 U. S. Code Sec. 381. The remedy in such circumstances is an appeal from the decision of the appraiser to the Board of General Appraisers. The Board shall assign the appeal to one of its members, who shall file reasonable notice of the time and place of hearing, "at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence." *This is the way that Congress spoke when it wished to attach to an administrative proceeding the incidents of a trial in court.*

Prior to the decision in the *Norwegian Nitrogen* case, *supra*, this court had occasion in *Ex Parte Bakelite Corporation, supra*, to consider with care the status of the Court of Customs and Patent Appeals. The issue as presented by counsel was whether a review by said court of a finding of the United States Tariff Commission, authorized by section 316, tariff act of 1922 (relating to unfair competition or acts) was a "case" or "controversy" within the mean-

ing of Article III of the constitution. All three parties concerned argued that the court was a constitutional court, but it was held (p. 460) that the court is a legislative and not a constitutional court and therefore that it was unnecessary to decide whether the proceeding then pending in the Court of Customs and Patent Appeals under Section 316 was a case or controversy.

In reaching its conclusion this court described the general jurisdiction and function of the Court of Customs Appeals as follows (p. 457-9):

> Before we turn to the status of the Court of Customs Appeals it will be helpful to refer briefly to the Customs Court. Formerly it was the Board of General Appraisers. Congress assumed to make the board a court by changing its name. There was no change in powers, duties or personnel. The board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and liquidating and collecting customs duties. But its functions, although mostly quasijudicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times.
>
> The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. *The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws.* These matters are brought before it by appeals from decision of the Customs Court, formerly called the Board of General Appraisers. *The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers.* True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without await-

ing disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.

This summary of the court's province as a special tribunal, *of the matters subjected to its revisory authority, and of its relation to the executive administration of the customs laws,* shows very plainly that it is a legislative and not a constitutional court.

* * * * * * *

But the argument is falacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred.

The above quoted statement was made by this court in reaching its conclusion on the single point decided and therefore should probably not be considered as *obiter dictum* as was the statement in the same opinion (p. 460) characterizing the superior courts of the District of Columbia as legislative courts. (See *O'Donoghue* v. *United States*, 289 U. S. 516, p. 550, holding them to be constitutional courts). Further, in *Williams* v. *United States*, 289 U. S. 553, this court referred (p. 568) to its "fully considered opinion" in the *Bakelite* case "holding that the Court of Customs Appeals was a legislative court" and stated, p. 571:

Further reflection tends only to confirm the views expressed in the *Bakelite* opinion as to the status of the Court of Customs Appeals, and we feel bound to reaffirm and apply them.

As the *Bakelite* and *Williams* decisions constitute this court's most recent expressions as to the type of jurisdiction exercised by the Court of Customs and Patent Appeals counsel considers it to be his duty to bring this matter to the court's attention for if, as stated in the *Bakelite* case, the appeals brought before said court "include nothing which inherently or necessarily requires judicial determination", it follows that the present proceeding is not a "case" and therefore this court does not have jurisdiction.

It is stated above that because of recent decisions counsel is inclined towards the opinion that the present proceeding is a "case". These decisions, however, do not relate to customs matters. As understood by counsel they hold that in determining whether a proceeding as a "case" it is not important that it was originally begun by administrative or executive determination; but, if, when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court, it is a case (*Old Colony Trust Co.* v. *Commissioner*, *supra*, p. 722). The term implies the existence of adverse parties whose contentions are submitted to the court for adjudication (*Chisholm* v. *Georgia*, 2 Dall. 431, 432, quoted in *Old Colony* case, p. 723). And it is not necessary for the court to have power to issue formal execution to carry its judgment into effect (Old Colony Trust Co., p. 725). Also, in *Federal Radio Commission* v. *Nelson*, *supra*, it was held that this court had jurisdiction to review a decision by the Court of Appeals of the District of Columbia because the decision of that court in the class of case considered was limited to review of the Commission on "questions of law." Further, in *Old Colony Trust Co.* v. *Commissioner*, *supra*, p. 724, it was said:

> In the case we have here, there are adverse parties. The United States or its authorized official as-

serts its rights to the payment by a taxpayer of a tax due from him to the government, and the taxpayer is resisting that payment or seeking to recover what he has already paid in taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise or judicial power.

Measured by these standards the present proceeding is a case. The Court of Customs and Patent Appeals limits its consideration to "questions of law" (Section 501, *supra*). The taxpayer and the government are adverse parties and recovery is sought of duties paid. The contention of the parties is submitted to the court for adjudication, and if the taxpayer prevails the Secretary of Treasury, acting under authority of Section 520 (1) tariff act of 1930, 19 U. S. C. 1520, is authorized to and does refund the duties either on liquidation or reliquidation of the customs entry. Article 3, section 2 also refers to "controversies as to which the United States shall be a party" but as this language was construed in *Williams* v. *United States*, *supra*, p. 577, as though it read, "controversies as to which the United States shall be a party, plaintiff or petitioner", it has no application here.

Because of these facts counsel is at loss to apply the language of the *Bakelite* decision quoted above to the present proceedings. However, as this decision represents a direct adjudication as to the functions of the Court of Customs and Patent Appeals in a proceeding such as is covered by this petition, motion is made that the petition be dismissed for lack of jurisdiction.

GEORGE R. TUTTLE,
Attorney for Respondent.

Except to point out that *Ex parte Bakelite Corp.*, 279 U. S. 438, involved an appeal to the Court of Customs Ap-

peals under Section 316 of the Tariff Act of 1922, after hearings and findings by the Tariff Commission and before transmission of its recommendation to the President, counsel for the United States do not desire to reply.

FRANCIS BIDDLE,
Solicitor General.

SUPREME COURT OF THE UNITED STATES.

No. 613.—October Term, 1939.

The United States, Petitioner,
vs.
George S. Bush & Co., Inc.

On Writ of Certiorari to the United States Court of Customs and Patent Appeals.

[May 20, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

The Court of Customs and Patent Appeals held invalid the Proclamation made by the President of the United States on May 1, 1934, increasing the duty on canned clams imported from Japan. 104 F. (2d) 368. We granted certiorari because of the importance of that decision to the administration of the flexible tariff provisions of the Tariff Act of 1930 (46 Stat. 590).

In compliance with § 336(a) of that Act, the Tariff Commission, in response to an application for an increased duty on canned clams, instituted an investigation in June 1932, gave public notice of the hearing, held the hearing in October 1932 and gave interested parties an opportunity to be present, to produce evidence, and to be heard. As a result of that investigation the Commission found that the statutory duty of 35% *ad valorem* on the foreign dutiable value[1] did not equalize the difference in the costs of production of the domestic article and the Japanese article. On such a finding the Commission was authorized by § 336(a) to recommend to the President an increase or decrease in the statutory rate but not in excess of 50 per cent; or in case the differences could not be equalized in that manner, it was empowered by § 336(b) to specify such *ad valorem* rate of duty based upon the American selling price[2] of the domestic article as it found necessary to equalize such differences. In the latter event, however, the statutory rate could not be increased. The Commission found that the rate of duty on foreign value which would be necessary to equalize the difference in costs exceeded the then existing statutory rate by more than 50 per cent. Accordingly it proceeded under § 336(b) to specify an *ad valorem* rate based on American selling price, and recommended to the President an increase in the duty, to be ef-

[1] Sec. 1, Sch. 7, Par. 721(b).
[2] As defined in § 402(g).

fected by assessing the rate of 35 per cent *ad valorem* on the American selling price.

It is provided in § 336(e) that the President "shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production." The Proclamation referred to the report and findings of the Commission and concluded that the change in duty recommended was "in the judgment of the President" necessary for that purpose. After the President issued his Proclamation, respondent imported some canned clams and they were appraised on the basis of the American selling price. It was on an appeal for reappraisement pursuant to § 501 that the Proclamation was held invalid by the Court of Customs and Patent Appeals. Its invalidity, according to that court, flowed from the basis on which the Commission computed the Japanese cost of production. By § 336(e)(2) the Commission was authorized, when the cost of production of a foreign article was not "readily ascertainable", to accept as evidence thereof the "weighted average of the invoice prices or values for a representative period." The Commission took the weighted average of such prices for the period from December 1, 1930 to September 30, 1932. Those prices were in Japanese yen. Sec. 336 contains no provision for conversion of currency. But the Commission, in order to compare those prices with domestic costs, converted them into United States dollars, at the average rate of exchange for 1932. That period was selected because Japan went off the gold standard in December 1931 and the value of the yen in terms of United States dollars declined steadily from that date to November 1932.[3]

[3] The Commission in its report to the President, dated April 5, 1934, stated on this point:

"The years 1931 and 1932 are representative with respect to the domestic cost of production of canned clams and the invoice prices of Japanese canned clams, in terms of Japanese currency. During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or probable future invoice values in terms of dollars. The Commission has, therefore, used for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932. Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932."

The Court of Customs and Patent Appeals held that it was error to convert invoice prices for one period into United States dollars at the average rate of exchange for another period. In its view the phrase "weighted average of the invoice prices or values for a representative period" contained in § 336(e)(2) must be construed as though it read, "weighted average of the invoice prices or values in United States currency for a representative period." The government, however, urges that if the Commission were forced to take the conversion rate for the earlier period, to which it had to resort in order to obtain the invoice prices, it would use a rate which had merely an historical interest and which did not reflect the conditions which made desirable an increase in duties, viz. the depreciation in the value of the yen.

The determination of foreign exchange value was prescribed, in the procedure outlined by Congress, neither for the action of the Commission nor for that of the President.[4] There is no express provision in the Act that the rate of exchange must be taken for the same period as the invoice prices. To imply it would be to add what Congress has omitted and doubtless omitted in view of the very nature of the problem. The matter was left at large. The President's method of solving the problem was open to scrutiny neither by the Court of Customs and Patent Appeals nor by us. Whatever may be the scope of appellate jurisdiction conferred by § 501 of the Tariff Act of 1930,[5] it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are necessary to equalize the differences in the domestic and foreign costs of production.

The powers which Congress has entrusted to the President under the Act of 1930 do not essentially differ in kind from those which have been granted him under the tariff acts for well over a century. See *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 308 *et seq.*, for a review of the statutes. Since its creation in 1916 the Commission has acted as an adviser to the Congress or to the President. Under § 336 of the Act of 1930 the Commission

[4] Sec. 522(b) provides that for "the purpose of the assessment and collection of duties" upon imports, foreign currency shall be converted at values proclaimed by the Secretary of the Treasury for the quarter in which the merchandise was exported. This section clearly has no application to the issue here, since it applies only to assessment and collection of duties—matters outside the functions and duties of the Tariff Commission.

[5] That section gives either party a right to appeal to the Court of Customs and Patent Appeals on "a question or questions of law only".

serves the President in that role. It does not increase or decrease the rates of duty; it is but the expert body which investigates and submits the facts and its recommendations to the President. It is the judgment of the President on those facts which is determinative of whether or not the recommended rates will be promulgated. In substance and to a great extent in form (*Norwegian Nitrogen Products Co.* v. *United States*, *supra*) the action of the Commission and the President is but one stage of the legislative process. *Hampton & Co.* v. *United States*, 276 U. S. 394. "No one has a legal right to the maintenance of an existing rate or duty." *Norwegian Nitrogen Products Co.* v. *United States*, *supra*, p. 318. And the judgment of the President that on the facts adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. *Martin* v. *Mott*, 12 Wheat. 19; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163; *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1. As stated by Mr. Justice Story in *Martin* v. *Mott*, *supra*, pp. 31-32: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains. Under the Constitution it is exclusively for Congress, or those to whom it delegates authority, to determine what tariffs shall be imposed. Here the President acted in full conformity with the statute. No question of law is raised when the exercise of his discretion is challenged.

The other points raised are so unimportant as not to merit discussion.

Reversed.

Mr. Justice McReynolds is of the opinion that the judgment below should be affirmed.